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1104

No. 2997

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

DIAMOND PATENT COMPANY (a corporation),  
Appellant,

vs.

WEBSTER BROS. (a corporation) and C. F. MUR-  
RAY, *et al.*,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for  
the Southern District of California,  
Southern Division.

Filed

MAY 8 - 1917

F. D. Monckton,  
Clerk.







United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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DIAMOND PATENT COMPANY (a corporation),  
Appellant,

vs.

WEBSTER BROS. (a corporation) and C. F. MUR-  
RAY, *et al.*,  
Appellees.

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Transcript of Record.

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Upon Appeal from the United States District Court for  
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**Names and Addresses of Attorneys.**

For Plaintiff and Appellant:

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For Defendants and Appellees:

M. G. GALLAGHER, Esq., Fresno, Cal.





*In the United States District Court for the Southern  
District of California, Northern Division.*

DIAMOND PATENT COMPANY,

Plaintiff,

vs.

WEBSTER BROS., a corporation,

Defendant.

A 55 Equity.

DIAMOND PATENT COMPANY,

Plaintiff,

vs.

C. F. MURRAY, *et al.*,

Defendants.

A 60 Equity.

Consolidated.

It is hereby stipulated that in printing the record on appeal to the Circuit Court of Appeals for the Ninth Circuit that the bill of complaint in the action against Webster Bros. need not be printed in full but shall give heading and state as follows: "Bill of complaint for infringement of patent, injunction and accounting in same form as the bill against C. F. Murray *et al.* except as to third paragraph, which alleges the incorporation of defendant under the laws of California and principal place of business at Fresno, Cal. And also excepting that infringement is charged by use of cases alone."

That in all other papers the formal headings, giving title of court and names of parties, shall be omitted.

That the petition for appeal need not be printed in full but shall state: "Petition for appeal in due form filed Jany. 30th, 1917, and allowed by order of court;

entered Jany. 30th, 1917, on filing an undertaking on appeal for \$500.00, and need not be printed in the record."

That the undertaking on appeal, in due form, was given and approved by Judge Trippet and filed Feby. 1st, 1917, and need not be printed in the record.

It is stipulated that an order allowing the withdrawal of the original exhibits and their transmittal to the Court of Appeals was signed by Judge Trippet and filed Feby. 26th, 1917, and such order need not be printed in the record.

It is stipulated that a citation on appeal was duly issued and served and need not be printed in the record.

J. J. SCRIVNER &  
G. E. HARPHAM,  
Attorneys for Plaintiff.  
M. G. GALLAHER,  
Attorney for Defendants.

---

*In the United States District Court, in and for the  
Southern District of California, Northern Di-  
vision.*

DIAMOND PATENT COMPANY (a corporation),  
Plaintiff,

vs.

CHAS. F. MURRAY and ROY C. MURRAY, co-  
partners under the firm name of MURRAY  
CABINET AND SHOW CASE CO.,  
Defendants.

**Bill of Complaint for Infringement of Patent, Injunction  
and Accounting.**

To the Judges of the District Court of the United  
States, for the Southern District of California:

Now comes the plaintiff above named and for cause  
of action against the defendant herein alleges:

I.

That the Diamond Patent Company (your orator)  
was at all times since February 4th, 1910, and still is  
a corporation, duly organized and existing under the  
laws of the state of California, and having its principal  
place of business at the city and county of San Fran-  
cisco, in said state.

II.

That defendants Chas. F. Murray and Roy C. Mur-  
ray are copartners in trade, doing business under the  
firm name of Murray Cabinet & Show Case Co., at the  
city of Fresno, county of Fresno, state of California,  
and reside in said city of Fresno.

III.

That the jurisdiction of this court in this suit de-  
pends upon its arising under the laws of the United  
States relating to patentable inventions, as will more  
fully hereinafter appear.

IV.

That, upon due application therefor in writing made  
and filed in the patent office of the United States by  
one Fred. Weber, on the 3rd day of October, 1904,  
valid letters patent of the United States No. 801,944,  
dated and issued October 17th, 1905, were duly granted  
to the said Fred. Weber, of the city of Los Angeles,  
county of Los Angeles, state of California, under and



in pursuance of the then existing statutes of the United States, for certain improvements and discoveries in "show cases," which said letters patent were duly delivered to and accepted by the said Fred. Weber, and the same or a duly authenticated copy thereof are ready to be produced in court and are hereby referred to and made a part hereof.

## V.

That said patent was issued for a new and useful invention, which was never before known, or used before the invention thereof by the said Fred. Weber; That said inventions described in said patent were not known or used by others in this country, or described in any printed publication in this or any foreign country before the invention or discovery thereof by the said Fred. Weber, for more than two years prior to his application for letters patent therefor, and no application for any foreign letters patent therefor had been filed more than seven months prior to the application for letters patent therefor in this country, and said inventions had not been in public use, or on sale in the United States for more than two years prior to the application of the said Fred. Weber for a patent therefor, and the same had not been abandoned to the public.

## VI.

That, prior to the commencement of this suit, the said Fred. Weber sold and assigned to the plaintiff corporation herein, to-wit: the Diamond Patent Company, all his right, title and interest in and to the said invention and the said letters patent therefor, and in and to all claims or rights of action for damages, gains and profits in anywise arising therefrom, or connected

therewith, and that the plaintiff then and there became, and ever since has been, and still is, the sole owner and holder of said invention and the said letters patent therefor, and the improvements described therein, and of all accrued damages and profits for any infringement thereof; and

That the said invention is of very great benefit and advantage, and that your orator and its assignor has, upon all of the show cases so made and sold by it, or by him, under said letters patent, fixed or caused to be fixed or marked thereupon the words "Patented," together with the day and year the said patent was granted, and the number thereof, thereby giving notice to the public at large that the said show cases were patented by the said letters patent. That the public have generally acknowledged and acquiesced in the aforesaid rights of your orator and its assignor, and that but for the invasion of its rights by the respondent herein complained of, your orator would continue to enjoy large gains and profits from the practice of the said invention.

## VI.

That heretofore, to-wit: on or about the 6th day of August, 1908, said Fred. Weber (plaintiff's assignor) commenced an action at law in the United States Circuit Court, Ninth Circuit, Southern District of California, Southern Division, against the Southern California Hardwood & Manufacturing Company, and on said last named day the said Fred. Weber filed his bill of complaint with the clerk of said court, whereby he alleged the issuance to him of said letters patent No. 801,944, and that said Southern California Hardwood

& Manufacturing Company had infringed upon said letters patent, and prayed for damages;

That thereafter said Southern California Hardwood & Manufacturing Company appeared in said suit and filed its answer therein, wherein it denied the infringement of said letters patent, and alleged the invalidity thereof upon various and sundry grounds; upon the issues so joined, evidence and proofs were introduced by both sides, and said cause came on regularly to be heard by said court, and after argument thereon was submitted to said court for its determination;

That thereafter, to-wit: on the 19th day of July, 1909, the said court, to-wit: the United States Circuit Court for the Ninth Circuit, Southern District of California, Southern Division, rendered its decision in said suit in favor of the said Fred. Weber (plaintiff therein) and against the Southern California Hardwood & Manufacturing Company (defendant therein) and made and entered its findings of fact and conclusions of law, and the said court thereby found that the said letters patent No. 801,944, granted to the said Fred. Weber, were good and valid in law; that the defendant had infringed the same, and that said Fred. Weber (plaintiff therein) had been damaged in the sum of three thousand dollars and judgment was thereupon, on said date, entered in said cause in favor of said Fred. Weber and against the said Southern California Hardwood & Manufacturing Company, for the sum of three thousand dollars (\$3000.00) and costs.

## VII.

That heretofore, to-wit: on the 10th day of April, 1910, the Diamond Patent Company commenced a suit

in equity in the United States District Court for the Northern District of California, Second Division, against R. A. Pulfer, E. Levin and Frank G. Boyd, and on said last named day filed a bill of complaint with the clerk of said court, whereby it alleged the issuance to it of said letters patent No. 801,944, and that said R. A. Pulfer, E. Levin and Frank G. Boyd had infringed upon said letters patent, and prayed for damages;

That thereafter said R. A. Pulfer, E. Levin and Frank G. Boyd appeared in said suit and filed their answer therein, wherein they denied the infringement of said letters patent, and alleged the invalidity thereof upon various and sundry grounds. Upon the issues so joined, evidence and proofs were introduced by both sides, and said cause came on regularly to be heard by said court, and after argument thereon was submitted to said court for its determination;

That thereafter the said court, to-wit: the United States District Court for the Northern District of California, Second Division, rendered its decision in said suit in favor of the said plaintiff therein and against the said defendants, R. A. Pulfer, E. Levin and Frank G. Boyd, and ordered the entry of an interlocutory decree, enjoining the said defendants, and each of them, from infringing said letters patent No. 801,944; and

That thereafter, to-wit: on the 11th day of March, 1912, there was signed and entered in said suit a final decree, wherein and whereby said letters patent No. 801,944 were adjudged good and valid in law and infringed by said defendants, R. A. Pulfer, E. Levin and Frank G. Boyd; that in and by said final decree said



defendants, R. A. Pulfer, E. Levin and Frank G. Boyd, were enjoined from infringing or contributing to the infringement of said letters patent No. 801,944.

### VIII.

That heretofore, to-wit: in the year 1912, plaintiff commenced a suit in equity, in the United States District Court, for the Eastern District of Washington, Northern Division, against S. E. Carr Company, a corporation, whereby it alleged infringement of said letters patent No. 801,944, and prayed for an injunction and other relief; that said S. E. Carr Company answered therein, denied infringement and set up as affirmative defenses that said letters patent were invalid upon various and sundry grounds, and particularly upon the ground that said patent was anticipated by the prior use of the inventions covered thereby, by one W. G. Whitcomb; that upon the issues so joined, evidence and proofs were introduced and said suit came on to be heard before the court on the . . . . day of September, 1913, and the same being argued was submitted to the court for its determination;

That thereafter the said court rendered its decision in favor of said S. E. Carr Company (defendant) and against plaintiff herein, upon the ground that said letters patent were invalid by reason of anticipation through prior use;

That thereafter plaintiff herein prosecuted an appeal from said court's decree to the Circuit Court of Appeals of the Ninth Circuit; that the parties to said cause filed their briefs in said court, and said matter was argued orally by counsel for both sides; and the same was thereupon submitted for the court's decision:

That thereafter, and on the 13th day of October, 1914, said court, to-wit: the Circuit Court of Appeals of the Ninth Circuit, rendered its opinion in writing in favor of plaintiff herein and against the said S. E. Carr Company, reversing the said lower court's decision, and found that said letters patent were valid.

IX.

That, since the granting of said letters patent, as aforesaid, and after full knowledge and notice of said letters patent, and of the invention therein described, the said defendant has infringed upon said letters patent, and each and all the claims thereof, within six years last past, by making, and causing to be made, and using and causing to be used, and selling and causing to be sold, in the Southern District of California, Northern Division, and elsewhere in the United States, show cases made in accordance with, and embodying the inventions set forth in the claims of said letters patent No. 801,944, issued to the said Fred. Weber, as aforesaid, willfully and without the consent of the said plaintiff, or its assignor, the said Fred. Weber, and plaintiff alleges:

That the said defendant is continuing to do so, and threatens to continue to do so;

Plaintiff further alleges: That said defendant has unlawfully derived large gains and profits by reason of such infringements—the exact amount of which plaintiff does not know—which amounts in equity the said defendant should account for and pay over to the said plaintiff; and that defendant has thereby caused, and is continuing to thereby cause, the plaintiff irreparable damage, loss and injury, and that plaintiff has

no plain, speedy or adequate remedy at law for the wrongs and grievances herein set forth.

Wherefore, the plaintiff prays for writs of injunction (as well preliminary and provisional as permanent) issuing out of and under the seal of this court, enjoining and restraining the defendants Chas. F. and Roy C. Murray from infringing upon said letters patent, and otherwise infringing the rights of plaintiff; that the defendants account to plaintiff for the profits made by them and the damages sustained by the plaintiff as a result of the infringing acts of defendant; and that in the decree to be rendered and entered herein, it be provided that the actual damages so assessed be trebled, in view of the willful and unjust infringement by said defendant; that plaintiff recover its costs and disbursements for this suit and have such other and further relief as may be meet in the premises;

That, upon the filing of this bill of complaint a writ of subpoena *ad respondendum* be issued and directed to the defendants commanding them to appear and answer this bill of complaint, in accordance with the rules of the court;

Plaintiff hereby waives the requirement of defendant's answering under oath.

DIAMOND PATENT COMPANY,

Plaintiff.

By James P. Shaffer,  
President.

G. E. HARPHAM,

Solicitor for Plaintiff.

SCRIVNER & MONTGOMERY,

Of Counsel for Plaintiff.

Duly verified August 4th, 1916.

Filed Aug. 7, 1916, as No. A 60 Equity.

[TITLE OF COURT AND CAUSE.]

**Answer.**

Come now the defendants, Chas. F. Murray and Roy C. Murray, copartners under the firm name of Murray Cabinet & Show Case Co., and for answer to plaintiff's complaint herein, deny, admit and allege:

I.

Defendants deny that since the granting of said letters patent and after full knowledge and notice of said letters patent, or at all, said defendants, or either of them, has infringed upon said letters patent or upon each and all the claims thereof, or upon any claim thereof, by making and causing to be made, and using and causing to be used, and selling and causing to be sold, in the Southern District of California, Northern Division, and elsewhere, or in any place whatsoever, or in any manner whatsoever, show cases made in accordance with, and embodying the inventions set forth in the claims of said letters patent, and deny that defendants, or either of them, have ever, at any time, manufactured or sold, or caused to be manufactured and caused to be sold, any show cases whatsoever made in accordance with or embodying the inventions set forth in the claims of said letters patent, and deny that the said defendants, or either of them, is continuing to make or manufacture or sell, or cause to be made, or manufactured or sold at any time or place, any show cases made in accordance with said claims in said letters patent, or embodying the claims set forth in said letters patent, or any of them.



## II.

Defendants deny that said defendants, or either of them, have derived large gains and profits, or any gains or profits by reason of such infringement or infringements; still denying that said defendants, or either of them, have ever infringed said patent or any claim thereof, and deny that defendants, or either of them, have caused or are continuing to cause the plaintiff irreparable damage, loss and injury, or any damage, or loss or injury whatsoever.

C. F. MURRAY.

By M. G. GALLAHER,

Attorney for Defendants.

Filed Sept. 25, 1916, as No. A 60 Equity.

---

*In the United States District Court, in and for the  
Southern District of California, Northern Di-  
vision.*

DIAMOND PATENT COMPANY (a corporation),  
Plaintiff,

vs.

WEBSTER BROS., a corporation,

Defendant.

Bill of complaint for infringement of patent, injunction and accounting in same form as preceding bill except 3rd paragraph, which alleges the incorporation of defendant under the laws of the state of California, and alleges that the city of Fresno, county of Fresno, is the principal place of business of defendant. Also

excepting the charge of infringement which in this bill is alleged to be done by user alone.

Duly verified May 27th, 1916.

Filed May 29, 1916, as No. A 55 Equity.

---

[TITLE OF COURT AND CAUSE.]

**Answer.**

Comes now the defendant, above named, and for answer to plaintiff's bill of complaint herein, admits, alleges and denies:

I.

Defendant has no knowledge, information or belief as to the allegation of paragraph I of said bill of complaint, and therefore denies that plaintiff is a corporation.

II.

Defendant has no knowledge or information or belief as to the allegations of paragraphs IV, V, VI, VII and VIII, and therefore denies each and all of the allegations of all of said paragraphs IV, V, VI, VII and VIII.

III.

Defendant denies that since the granting of said letters patent, as aforesaid, or at all, and after full knowledge and notice of said letters patent, or at all, or after full knowledge and notice of the invention therein described, or at all, the said defendant has infringed upon said letters patent, or upon any letters patent, or that defendant has infringed upon each and all, or each or all the claims of said letters patent within six years last past, or at all, by making or by causing to be made,

or by using or by causing to be used, in the Southern District of California, Northern Division, or at any place, or at any time, or at all, show cases or any show case or show cases made in accordance with or embodying the inventions set forth in said letters patent, or in any letters patent whatsoever; and denies that said defendant is continuing to do so, or threatens to continue to do so, and defendant further denies that defendant has unlawfully derived large gains or profits, or any gains or profits, by reason of such infringements, or any infringement, and denies that defendant has thereby or at all, caused or is continuing to thereby or at all cause the plaintiff irreparable damage or loss or injury.

IV.

And further answering, defendant says that the bill of complaint herein fails to allege any matter or equity entitling the plaintiff to the relief prayed for therein.

Wherefore, defendant prays judgment of this court that plaintiff take nothing by reason of its complaint herein.

M. G. GALLAGHER,  
Attorney for Defendant.

Duly verified July 10th, 1916.

Filed July 10, 1916, as No. A 55 Eq.

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[TITLE OF COURT AND CONSOLIDATED CAUSES.]

**Order Consolidating Cases No. A 60 and No. A 55.**

The motion of the Diamond Patent Company made herein to have the case of Diamond Patent Company vs. Webster Bros. (a corporation), No. A 55, consoli-

dated with the case of the Diamond Patent Company vs. C. F. Murray and Roy C. Murray (a co-partnership, doing business under the firm name and style of: "Murray Cabinet & Show Case Co."), No. A 60, and both of said causes tried together as one cause, coming on regularly to be heard on this 2nd day of October, 1916, and said motion having been consented to by the defendants in open court, the same is hereby granted; and

It is hereby ordered, that the case of the Diamond Patent Company (a corporation) vs. Webster Bros. (a corporation), No. A 55, be consolidated with the case of Diamond Patent Company (a corporation) vs. C. F. Murray and Roy C. Murray (a co-partnership, etc.), No. A 60, pursuant to the statutes in such cases made and provided, and that said causes be tried together as one cause, and that the orders and proceedings heretofore had in said causes, respectively, are hereby made orders and proceedings in the consolidated causes, as they may be applicable thereto, and the evidence hereafter offered and admitted in this consolidated cause shall be treated as evidence in both, so far as applicable and subject to all legal objections thereto, and that the said consolidated causes hereafter proceed under the joint title of said cases, as above set forth.

Dated this 2nd day of October, 1916.

TRIPPET,  
Judge.

Filed Oct. 2, 1916.



*In the United States District Court, in and for the  
Southern District of California, Northern Di-  
vision.*

DIAMOND PATENT COMPANY (a corporation),  
Plaintiff,

vs.

C. F. MURRAY and ROY C. MURRAY (a co-part-  
nership doing business under the firm name and  
style of: "MURRAY CABINET & SHOW  
CASE CO."),

Defendants.

No. A-60.

and

DIAMOND PATENT COMPANY (a corporation),  
Plaintiff,

vs.

WEBSTER BROS. (a corporation),

Defendant.

No. A-55.

(Consolidated.)

### **Final Decree Dismissing Bills of Complaint.**

The above entitled consolidated causes came on regularly to be heard at the November term, 1916, at the city of Fresno, in the Northern Division of the Southern District of California, J. J. Scrivner, Esq., appearing as attorney for the plaintiffs, and M. G. Gallaher, Esq., appearing as attorney for the defendants in the above entitled actions. Whereupon oral and documentary testimony was introduced and the cases argued by counsel and submitted to the court for its decision. And, after due consideration thereof, it was ordered,

F. WEBER.  
SHOW CASE.  
APPLICATION FILED OCT. 8, 1904

Fig. 1

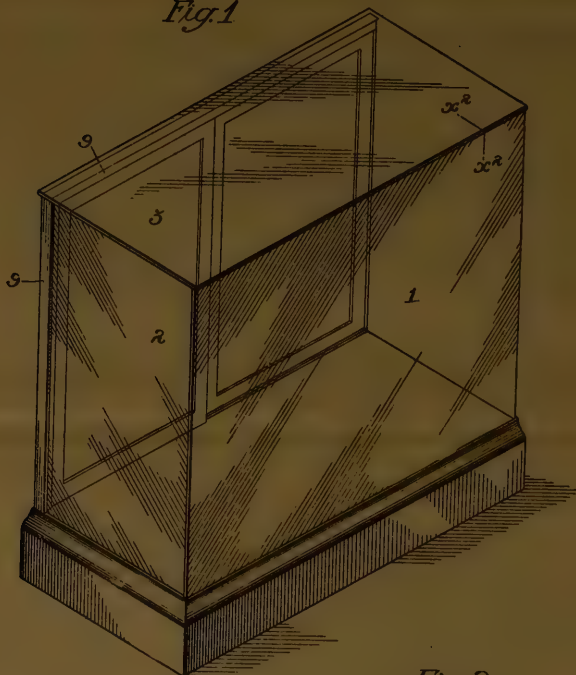


Fig. 3.

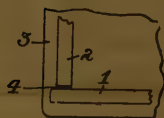


Fig. 4.

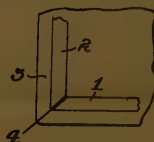


Fig. 2.

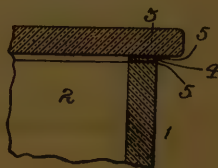


Fig. 5.



Witnesses:-  
Frank L. A. Graham.  
H. T. Mackay

Inventor;  
Fred Weber.

7  
Townsend Bros.  
attys.

# UNITED STATES PATENT OFFICE.

FRED WEBER, OF LOS ANGELES, CALIFORNIA.

## SHOW-CASE.

No. 801,944

Specification of Letters Patent.

Patented Oct. 17, 1905.

Application filed October 3, 1904. Serial No. 226,882.

*To all whom it may concern:*

Be it known that I, FRED WEBER, a citizen of the United States, residing at Los Angeles, in the county of Los Angeles and State of California, have invented a new and useful Show-Case, of which the following is a specification.

This invention relates to improvements in glass show-cases; and the improvement resides particularly in the means for fastening one glass surface to another glass surface or to woodwork forming part of the case.

The object of the invention is to do away with drilling holes through the glass and to dispense with metallic or other fastening devices which are commonly used at the corners for holding the plates forming the case together and to provide a fastening which will unite the parts so securely that they cannot be separated except by such stresses or blows as would break the glass before accomplishing the dismemberment, although by the use of a proper tool the parts may easily be separated.

Another object is to provide for a certain amount of elasticity at the joint, whereby a cushion effect is produced. If the parts were rigidly united, severe shocks received by the show-case would tend to shatter the plates or displace the parts; but in the present invention the cushion-joint aids in maintaining the union of the parts, affording, as it does, an elastic or resilient joint, which eases the strain at the actual union or contact-faces of the plates, thereby also greatly softening the effects of shocks received by the case.

The accompanying drawings illustrate the invention, and, referring thereto, Figure 1 is a perspective view of a show-case the plates of which are fastened together with my improved means. Fig. 2 is an enlarged sectional view on line  $x^2 x^2$ , Fig. 1. Fig. 3 is a bottom plan of a corner, showing the manner of fastening the side plates to the top. Fig. 4 is a view similar to Fig. 3, illustrating a miter-joint. Fig. 5 is a sectional view illustrating the method of fastening glass plates with an intervening strip of molding.

The invention comprises in combination with the parts to be united, such as glass or other material having a vitreous surface, a strip of yielding material, such as felt, which is interposed between the adjacent faces to be united, each face of the yielding material having a coating of cement, which forms the

union between the yielding material and the surface of the adjacent part.

Referring particularly to Fig. 2, 1 designates the front plate. 2 is the side plate, and 3 is the top plate, resting upon the front and side plates with a strip of felt 4, which lies upon the top edge of the side plates 1 and 2, both top and bottom faces of the felt 4 having cement 5, which unites the plates to the felt. The cement is applied to the felt superficially, forming a skin, as it were, on both sides of the felt, the body of the felt thus retaining its natural state. If the cement were applied to the felt so as to permeate the same, by uniting with the felt it would form a hard practically homogeneous substance, thus destroying the resiliency of the felt. The cement should be applied to the felt when quite thick, so that it will not soak into the felt. Thus a laminated structure is produced comprising the two layers of cement, with an intervening layer of felt forming the yielding or resilient substance. Any desired form of cement may be used for this purpose, and yielding or resilient substances other than felt could be employed, which selections are obviously embraced in the scope of my invention.

In Fig. 3 the front plate 1 extends slightly beyond the outside face of the side plate 2, as shown, the top plate 3 preferably overhanging both the front and side plates, so as to give a neat finish to the case.

Fig. 4 shows the side plate 2 and front plate 1 united with a miter-joint with the intervening laminated felt and cement structure. This method gives a greater area of union between the front and side plates and in some cases may be preferred.

Fig. 5 shows a rabbeted molding 6, which rests upon the front plate 1, the top plate 3 resting upon the molding 6, the felt and cement structure being located between the molding and glass, as shown. A strip 7 extends along inside the plate 1, being fastened to the molding 6 by pins 8 or any other suitable means, the strip holding the plate 1 in place on the molding 6. This method of union permits easy assembling of the parts.

The construction shown in Fig. 5 enables thin glass to be used affording sufficient cementing area, the narrow thin edge alone not giving sufficient cementing area.

At the back of the case, where the glass

plates fasten to the wooden structure 9, as shown in Fig. 1, the same fastening means, consisting of the laminated structure of felt and cement, is also employed with equally good results.

The cement may be silvered, if desired, to give a neat appearance when seen through the glass, or it may be colored green, or any other color, green being preferred for both felt and cement.

Parts which have been united in this manner cannot be separated without breaking the glass, except by running a sharp knife through the felt between the two layers of cement. This feature is one of considerable value, inasmuch as it permits of easy removal of a plate when desired, as in altering the structure of the case or in making repairs when one or more of the glass plates become broken. The yielding nature of the felt cushion absorbs the sharpness of shocks on the case and obviates breakage, which so frequently happens with all other forms of fastenings now known, particularly metallic corner-fastenings or structures in which a glass plate is grooved to receive the edge of another glass plate, which parts are united by cement at the groove, or show-cases in which the vertical glass plates are tightly fitted in grooved frames of wood or other material. In the latter structures severe shocks imparted directly to the front or side plates will fracture them, as a side plate has no interresiliency with the front plate or top frame; but the present invention avoids this difficulty, as there is interresiliency with both top and vertical plates which allows each plate to move relatively to the other, whether one plate alone is jarred or whether all plates are jarred simultaneously, so that each plate vibrates its own degree and direction. The effect of this is particularly noticeable at the corners formed by the junction of three plates—the top plate, a side plate, and front

plate—as at the corners referred to unless perfect cushioning of each plate is provided a fracture is very likely to occur, resulting from the rigidity of the three-line joint and the unequal rate of vibration of the respective three plates and the conflicting directions or planes of vibration centering at one point, and so far as I am aware I am the first inventor to provide a structure comprising glass plates arranged in three different planes, each plate meeting and joining the other two, with an intervening cushion between the joining faces, to which cushion the glass plates are cemented.

What I claim is—

1. A structure comprising a plurality of glass plates, the edges of which are spaced from the adjacent plates, a felt cushion filling the space between the adjoining plates, the plates being cemented to the felt, each plate being adapted to freely vibrate in its natural plane of vibration, and prevented by the felt cushion from imparting its vibration to the adjacent plates.

2. A structure comprising a plurality of glass plates, an unconfined edge of one plate nearly but not quite meeting another plate with unconfined adjacent edge, an elastic material filling the space thus existing between the nearest adjacent surfaces of the plates, said plates being attached to the elastic material, whereby the plates by reason of their unconfined edges and the intervening elastic material can each vibrate or move in any direction independently.

In testimony whereof I have hereunto set my hand, at Los Angeles, California, this 24th day of September, 1904.

FRED WEBER.

In presence of—

GEORGE T. HACKLEY,  
FREDERICK S. LYON.



adjudged and decreed as follows, viz.:

Ordered, adjudged and decreed: That the bills of complaint of the plaintiffs above named be and they are each hereby dismissed, and that the said defendants do have and recover from the said plaintiffs the costs incurred by them in said suits;

It is further ordered: That the orders and decrees entered in each of said causes, and dated December 16th, 1916, be and they are hereby vacated and set aside.

Done in open court this 22 day of January, 1917.

OSCAR A. TRIPPET,

Judge.

Decree entered and recorded January 22, 1917. Wm. M. Van Dyke, clerk; by Geo. W. Fenimore, deputy clerk.

Filed Jan. 22, 1917.

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[TITLE OF COURT AND CONSOLIDATED CAUSES.]

**Condensed Statement of the Testimony Taken in the Consolidated Actions A 55 and A 60, Prepared Pursuant to Rule No. 75 of the United States Equity Rules.**

For the purpose of establishing the case for the plaintiff, the plaintiff's counsel first introduced plaintiff's patent, issued to Fred. Weber, No. 801,944, dated October 17th, 1905, which said patent is in the words and figures following, to-wit:

**(FOLDER.)**

Plaintiff thereupon offered in evidence an assignment of the patent from said patentee, Fred. Weber, to the plaintiff, Diamond Patent Company, which said assignment is dated February 5th, 1910, and is in the words and figures following, to-wit:

"Whereas, I, Fred. Weber, of Los Angeles, county of Los Angeles, state of California, did obtain letters patent of the United States for an improvement in show cases, which letters patent are numbered 801,944 and bear date the 17th day of October, in the year 1905; and whereas I am now the sole owner of said patent and of all rights under the same; and whereas the Diamond Patent Company, a corporation, duly organized under the laws of the state of California and having its principal place of business in the city and county of San Francisco, of said state, is desirous of acquiring the entire interest in the same;

Now, therefore, to all whom it may concern, be it known that, for and in consideration of the sum of one (1) dollar to me in hand paid, the receipt of which is hereby acknowledged, I, the said Fred. Weber, have sold, assigned and transferred, and by these presents do sell, assign, and transfer unto the said corporation, the whole right, title and interest in and to the said improvement in show cases and in and to the letters patent therefor aforesaid and to all rights of recovery for past infringements, the same to be held and enjoyed by the said corporation for its own use and behoof, and for the use and behoof of its legal representatives, to the full end of the term for which said letters patent are or may be granted, as fully and entirely as the same would have been held and enjoyed

by me had this assignment and sale not been made.

In testimony whereof, I have hereunto set my hand and affixed my seal at Los Angeles, in the county of Los Angeles, and state of California, this 5th day of February, 1910.

(Signed) FRED. WEBER.

(Duly acknowledged.)

(Seal)"

It was thereupon admitted that plaintiff, Diamond Patent Company, was a corporation as alleged in the complaint.

Plaintiff's counsel thereupon made his opening statement, which is as follows:

"Mr. Scrivner: If Your Honor pleases, I will now make a brief statement in explanation of this patent in order that Your Honor may now understand what we are fighting about. Litigation over this patent has been pending in various courts of the United States for a good many years. That is to say, every now and then somebody would pop up and would undertake to make these cases, and we had to show, and so far we have been successful in maintaining the integrity of the patent; but every time it comes up, the court, if it is a judge that has not tried one of them, has to understand what it is; and, if Your Honor will permit me, instead of stating it at length, myself, I will read from Judge Gilbert's decision.

The patent is for a show case to be used in exhibiting small commercial articles for sale. In the prior art there had been show cases made of wooden frames with glass plates fixed in grooves therein, and later show cases had been made of glass alone, the plates

of which were held together by metal clips, attached at the several corners of the glass plates. These not having proved satisfactory, glue or paste was inserted along the edges of the plates, which, becoming hard, assisted in holding them in place. Other show cases were made of glass with the edges of the plates glued or pasted together, and with bolts or screws inserted through the glass plates at the corners, in lieu of metal clips. Later, show cases were made all of glass by pasting or gluing the edges of the glass plates together without clips, bolts, or screws; but they were not satisfactory, for the reason that, as soon as the glue or the paste dried the joints became rigid, and, there being no vibration or yield therein, the plates were easily broken. Weber conceived the idea of inserting a strip of elastic or vibrating material between the glass plates, in order to prevent breakage in moving the same, and breakage from the expansion or contraction caused by heat or cold. In his specification he described his improvement as residing particularly in the means of fastening one glass surface to another, or to the woodwork forming a part of the case. The object of this, he said, was to do away with drilling holes through the glass and to dispense with metallic or other fastening devices, and to provide for a certain amount of elasticity of the joint, whereby a cushion effect is produced. He continued: 'If the parts were rigidly united, severe shocks received by the show case would tend to shatter the plates or displace the parts; but in the present invention the cushioned joint aids in maintaining the union of the parts, affording, as it does, an elastic or resilient joint, which eases the strain at



the actual union or contact spaces of the plates, thereby greatly softening the effects of shocks received by the case. \* \* \* The cement is applied to the felt superficially, forming a skin, as it were, on both sides of the felt, so as not to permeate the same. By uniting with the felt, it would form a hard, practically homogeneous substance, thus destroying the resiliency of the felt. The cement should be applied to the felt when quite thick, so it will not soak into the felt.'

There are two claims. We claim that they infringe both claims; that they have been and are now making and using show cases made—all-glass show cases. This refers to a particular show case called in the trade all-glass show case, a structure comprising a plurality of glass plates.

We claim that they have made the same case, by the insertion of a plastic or elastic cement, with felt in between the two layers of cement, exactly as described in the first claim, and we claim that that really infringes both claims, that that is itself an infringement of the second claim. Of course, it is not a very important matter, if the court finds an infringement of one claim, that is sufficient, but heretofore it has been held that a case made that way was as much an infringement of the second claim as it was of the first, because it is an elastic material. That is to say, the second claim is broader than the first claim, the first claim being limited to the insertion of a felt or its equivalent of course; while the other claim is not limited to anything except simply an elastic material, which might be a cement itself alone without any felt. That is the only difference between the two claims."

It was thereupon admitted in open court that the only issue involved in the case, to be tried and submitted to the court, was the question of infringement, or no infringement.

“The Court: Now, we will take your claims and run over them and find out where we are. Take your claim: ‘A structure comprising a plurality of glass plates.’ The defendants’ device has that, Mr. Gallaher?

Mr. Gallaher: Yes, sir.

The Court: ‘—the edges of which are spaced from the adjacent plates’—your device has that?

Mr. Gallaher: Yes.

The Court: ‘—a felt cushion filling the space between the adjoining plates’?

Mr. Gallaher: No.

Mr. Scrivner: Now, wait. If Your Honor pleases, let us understand. They do have it, and we are prepared to show that.

The Court: They say they have not got it. ‘—the plates being cemented to the felt.’

Mr. Gallaher: No.

Mr. Scrivner: Yes.

The Court: Well, I am finding out what they claim. ‘Each plate being adapted to freely vibrate in its natural plane of vibration.’

Mr. Gallaher: No.

Mr. Scrivner: Yes.

The Court: ‘And prevented by the felt cushion from imparting its vibration to the adjacent plates’?

Mr. Gallagher: No.

The Court: Now then, I will read the second claim:

‘A structure comprising a plurality of glass plates, an unconfined edge of one plate nearly but not quite meeting another plate.’ You have got that, Mr. Gallaher?

Mr. Gallaher: Yes.

The Court: ‘Also with unconfined adjacent edge.’ That is the third element—‘unconfined adjacent edge.’ You have that, too?

Mr. Gallaher: Yes.

The Court: Fourth. ‘An elastic material filling the space thus existing between the nearest adjacent surfaces of the plates’?

Mr. Gallaher: No.

The Court: You have not got that. ‘4a: Said plates being attached to the elastic material’?

Mr. Gallaher: No.

The Court: ‘Whereby the plates by reason of their unconfined edges and the intervening elastic material can each vibrate or move in any direction independently.’

Mr. Gallaher: No.

The Court: Well, now, we know what we are litigating about. Now you have to prove that the defendant has ‘a felt cushion filling the space between the adjoining plates, the plates being cemented to the felt, each plate being adapted to freely vibrate in its natural plane of vibration, and prevented by the felt cushion from imparting its vibration to the adjacent plates.’ That is the first claim. Now, the second, you have to prove, ‘an elastic material filling the space thus existing between the nearest adjacent surfaces of the plates, said plates being attached to the elastic material, whereby the plates by reason of their unconfined

edges and the intervening elastic material can each vibrate or move in any direction independently.' Now, there is the issue."

MR. FRED. WEBER was thereupon sworn and examined as a witness, and testified as follows:

"I am the patentee of this patent, and an officer of the plaintiff company. I have had about eleven years' experience in the manufacture of this show case. I have made approximately up to date about 20,000 linear feet. I know that there are a great many licensees of the plaintiff scattered throughout the country. I thoroughly understand the construction and mode of operation of these cases. I have examined some of the defendants' cases. I have examined the cases at the store of Webster Drug Company, in Fresno, on the first of July; said store belonging to the Webster Bros., one of the defendants here. It was made by the Murray Company.

The Court: The defendant don't deny they are making the cases, do you, Mr. Gallaher?

Mr. Gallaher: We don't deny we are making all-glass cases, no.

The Court: The only question involved is here whether the things the defendants are making are the same things as yours.

Mr. Scrivner: Q. Now, just describe the case that you examined, what you saw, how it was built, how it was made and what it did.

A. The case is constructed with a joint between the different plates of glass, with the cushion between the plates, a cushion or a layer of felt in between the



(Testimony of Mr. Fred Weber.)

joints approximately one-sixteenth of an inch thick, with cement on both sides of the felt, cemented to the plates and holding them in position, and making the joint about one-eighth of an inch thick. They were elastic joints.

Q. What do you mean by that?

A. They would 'give' or would allow for contraction and expansion between the different plates.

.....  
A. A resilient joint is simply a joint, as I understand it, that will allow for expansion and contraction.

The Court: He said these things were resilient. I want to know whether he knows what it means.

Mr. Scrivner: Now explain to the court the trouble that arises from a plat that is rigid.

A. I have done considerable experimenting in the rigid joints and I have found that the glasses would generally break on account of not being allowed to properly vibrate or expand and contract on account of the heat or cold which they received. With certain elastic material between the joints to take up what little vibration there may be, or expansion or contraction, this trouble was avoided.

A. These glass plates are generally one-fourth of an inch thick; they come in all sizes, I will say two by six feet would be an average size.

The Court: What did you do to these that you examined, to determine whether they were resilient or had vibration?

A. I put a knife blade through the joint; I cut out some of the felt.

(Testimony of Mr. Fred Weber.)

The Court: Is there any other way to determine whether or not it is a resilient joint or vibrates?

A. There is no other that I know of. The cement was plastic. It was soft enough for the knife blade to go through the joint.

Mr. Scrivner: Well, now how did that cement which you found in those joints compare with the cement that you used, in reference to its being hard or soft?

A. It appears the same; it is the same as ours, as near as I could see; the same as what we have been using. There is no difference in appearance between that and what we make under the patent. There was no apparent difference in the condition of the cement. There was no difference in the apparent condition and arrangement of the felt in the joints. I could see some of the felt; it was plain to be seen; the felt is seen on the edge here (referring to sample case).

The Court: The edges of the felt can be seen, you say?

A. Not in all cases. In some cases the edges of the felt are covered up by reason of cleaning the cement. That is, in cleaning the cases, the cement is liable to stick to the edge of the felt and penetrate the felt and it will look as though it might be all cement on the end, or on the edge.

Mr. Scrivner: Q. But in the cases which you examined which were made by the defendant, the felt was plainly visible on the outside?

A. In some instances, not all of them.

(Testimony of Mr. Fred Weber.)

Q. How many places did you put your knife through?

A. Oh; if I remember correctly, 8 or 10 different places.

Q. From your experience in the construction and handling of these cases, was the top plate removable in the manner described in your patent?

A. Yes, sir.

The Court: You will see in the patent it describes, as one of the features of the invention, that the top plates were removable with an instrument. It is no part of the claim. Nothing in the claim about it.

Mr. Scrivner: No, still it goes to illustrate the invention; if it is a rigid material you can't do it, you have to break the glass. It only tends to corroborate his theory, that it was a plastic material. Plastic material is soft.

The Court: Proceed with your questions.

"Parts which have been united in this manner cannot be separated without breaking the glass, except by running a sharp knife through the felt between the two layers of cement." Is that what you mean?

A. Yes, sir.

The Court: This feature is one of considerable value, inasmuch as it permits of easy removal of a plate when desired, as in altering the structure of the case or in making repairs when one or more of the glass plates becomes broken.

Mr. Scrivner: Yes, that is what I had reference to.

Mr. Scrivner: Did you examine these cases made by

(Testimony of Mr. Fred Weber.)

the defendant in more than one store or place of business?

A. Yes, sir.

Q. What was the difference in them?

A. I have seen no difference.

Q. All apparently made alike?

A. Yes, sir.

Q. You say then, Mr. Weber, from your experience and knowledge of this matter, this whole subject matter, that these plates were adapted to freely vibrate in the natural plane of vibration and were prevented by the felt cushion from imparting its vibration to an adjoining plate, and are infringements of the patent.

A. Yes, sir.

Q. Well, you have had numerous cases—a number of them coming before the court. Are they made in the same way?

The Court: I don't see that it makes any difference about that. They admit they are making them. There is no accounting here now, and it don't make any difference now how many they were making. They admit they are making them. They are admitting they are making cases of the kind he says. The only question I see is the question you have already gone into, and that is whether what they are making is covered by your patent.

Q. Is there any means that you experts in this line of business have of determining an elastic joint, a joint or structure that the plates will vibrate in case of jars in the building, or from heat and cold and so on?

A. We have no means outside of probably a knife



(Testimony of Mr. Fred Weber.)

blade or a pin or something on that order that we might insert in the joint.

Q. Well, in the sticking of a knife blade into a joint, if the knife blade penetrates it and shows it is soft, what do you understand to be the result?

A. Well, that would be what I would consider a resilient joint.

Q. Well, it is soft, isn't it, plastic?

A. Soft, resilient.

Q. And does that act as a sort of cushion in the joint?

A. Yes, sir.

Q. So that the possible vibration of a plate of glass would be protected by this resiliency or softness of the material.

A. Yes, sir.

#### Cross-Examination

By Mr. Gallaher:

Q. You say the only means by which you determine that these were resilient or cushion joints was the fact that you ran a knife blade through the joint?

A. Yes, sir.

Q. If that joint had been cement, of the consistency of red brick, you could have run a knife through it, couldn't you?

A. I would not think so.

Q. If it had been lead you could have run a knife through it, couldn't you?

A. Soft lead, you could.

Q. If it had been lead of the ordinary character

(Testimony of Mr. Fred Weber.)

used from which to mould bullets you could have run a knife through it, couldn't you?

A. I don't know as to that.

Q. If it had been wood, mountain pine, you could have driven a knife through it, couldn't you?

A. Yes, sir.

Q. If it were felt with cement permeating the felt so as to make a direct conglomerate of that felt and cement, in contact with the two pieces of glass, you could run a knife through it, couldn't you?

A. I would not hardly think so, depending somewhat on the kind of cement glue that was used.

Q. You prepared, I suppose, these specifications in this patent, didn't you?

A. Yes, sir.

Q. And you said in that, if the cement were applied to the felt so as to permeate the same, by uniting with the felt it would form a hard, practically homogeneous substance?

A. Yes, sir.

Q. Thus destroying the resiliency of it?

A. Yes, sir.

Q. That was true when you said it in the specifications, wasn't it?

A. That was true. In that was meant the kind of cement that will permeate the felt.

Q. Then if this cement in these show cases that you examined was such that, when placed upon the felt, or the felt placed in the cement, was of such consistency as to permeate the felt, when that would become rigid and unite the two pieces of glass, it would

(Testimony of Mr. Fred Weber.)

be what you describe in your specifications as a rigid joint, wouldn't it?

A. If it permeated the felt, it would.

Q. And it did permeate the felt in these particular show cases you examined, didn't it?

A. No, sir.

Q. Now, you have examined exhibit marked No. 1, which I will call Defendants' Exhibit No. 1, and I believe you said that you couldn't tell whether that was a rigid joint or not.

The Court: Do you want this marked Defendants' Exhibit No. 1?

Mr. Gallaher: Yes. (To the witness.) Look at it again. Is that a rigid joint?

A. I couldn't tell without trying.

Q. Is there felt in it?

A. I can't see any.

Q. Is there wood in it?

A. There seems to be felt in this.

Q. What do you say now?

A. Let me break it apart and I can tell you.

Q. You didn't break the show cases apart, did you?

A. No, those show cases were not examined that way.

Q. We are talking about this model, Defendants' Exhibit No. 1.

A. I can't see any felt in this exhibit.

Q. Is it a rigid joint?

A. No, sir.

Q. It is not. Will you demonstrate to this court

(Testimony of Mr. Fred Weber.)

how the two plates of glass move, as specified in the claim No. 2, if this was a rigid joint?

A. By inserting a knife blade in here, it would break loose.

Q. But, I want to call your attention again—I suppose you prepared the claims in this patent, didn't you?

A. Yes, sir.

Q. And you said in those claims this: "An elastic material filling the space between the nearest adjacent surfaces of glass." That would be this space in here, wouldn't it?

A. Yes, sir.

Q. "The said plates being attached to an elastic material." Are those attached to an elastic material there?

A. Yes, sir.

Q. They are not attached to each other by cement, are they?

A. This is an elastic material here.

Q. All right. Now let us see. You discovered that since I asked you the question awhile ago, but listen: "Whereby the plates by reason of their unconfined edges and the intervening elastic material can each vibrate or move in any direction independently."

A. Yes, sir.

Q. Now, you show the court how this one can move, over there, by this moving.

A. It is not necessary for the plates to move except in allowing for expansion and contraction.

Q. Now, answer my question. Show this court how the top plate can move towards the court without the



(Testimony of Mr. Fred Weber.)

verticle plate moving towards him, whether a millionth of an inch, or an inch.

A. It can, if there is a plastic material in between there, it allows the top plate sufficiently to expand on account of the contraction or expansion by heat or cold.

Q. Will you take that and demonstrate to this court, other than by running a knife into the material of it, how it is an elastic or cushion joint? Can you press down hard enough to squeeze it together?

A. That is not—

Q. Can you do so, without absolutely breaking it, move it one millionth of an inch?

A. Yes, sir.

Q. Well, demonstrate that.

A. I have already done that here.

Q. Has it raised up any?

A. Yes, sir.

Q. How much?

A. Not much.

Q. Now I hand you here what I will offer an Defendant's Exhibit No. 2, and ask you whether or not there is felt in that?

A. I can't see any on the edge.

Q. Is there wood in it?

A. I can't see any.

Q. Is there any material between the glasses at all of any kind whatsoever?

A. There is elastic material in here.

Q. Elastic material. How do you determine it is an elastic material?

(Testimony of Mr. Fred Weber.)

A. Well, I think if this was not elastic I couldn't put the knife blade in there.

Q. Anything that you can run a knife through is elastic?

A. It is yielding.

Q. Red brick is elastic?

A. I have never tried it.

Q. A piece of granite is elastic?

A. I have not tried it.

Q. But anything you can put a knife through is elastic?

A. Yielding.

Q. Why did you provide in your patent that it was felt you were going to use?

The Court: He says in the last one there was an elastic material.

Mr. Gallaher: I hand you here what will be Defendants' Exhibit No. 3, and ask you whether or not there is any felt in that?

A. I don't think there is any felt in this.

Q. Is there any wood in it?

A. No, sir.

Q. What is in it?

A. Seems to be simply cement in there.

Q. Simply cement.

A. Yes, sir.

Q. Is that elastic or rigid?

A. This seems to be quite rigid.

Q. Quite rigid?

A. Yes, sir.

(Testimony of Mr. Fred Weber.)

Q. Now what is the difference between the rigidity of that one and of Defendants' Exhibit No. 2?

Q. Now, number two you said was a resilient joint. You discover now that that is a joint made of wood?

A. I would consider this resilient enough for the purpose.

The Court: What did you say?

A. Resilient enough for the purpose. The plates don't move up or down or sideways. It is simply to allow for contraction and vibration, which this strip of wood will.

Mr. Gallaher: But your claim then as to the plates moving was not a true claim at all.

A. The plate was never intended to move on the showcase.

Q. Now, what is the difference between number three, what will be Defendants' Exhibit No. 3 and No. 2, which you now say is resilient enough?

A. This kind of cement even, that would be resilient.

Q. That is resilient enough. Is there any wood in it?

A. There is no wood. That is resilient, allowing for expansion and contraction.

Mr. Gallaher: You don't know what the joint is composed of?

A. It is composed of that cement.

Q. No. 3. Then if that cement were put on in a state in which it would permeate the felt, it would make a rigid joint which you say in your specification would be a bad joint, wouldn't it?

(Testimony of Mr. Fred Weber.)

A. No, sir.

Q. It would not?

A. No, sir.

Q. You don't really know much about the making of these things, do you?

A. I have the first one that was ever made.

Q. And that is the sum total of your knowledge, that you made the first one?

A. I have devised the construction of something over 20,000 linear feet of that.

Q. And yours are all resilient joints, I suppose?

A. Yes, sir.

Q. If they were not, you would not regard them as worth anything?

A. Well, I wouldn't say as to that. I don't consider a solid joint a good construction, for the reason that they will break.

Q. You wrote the little advertising pamphlet, didn't you, that advertises the all-glass showcase you make?

A. Not personally.

Q. Who did write it?

A. One of our men.

Q. Have you a copy of that with you, the advertising pamphlet used by the plaintiff in this case?

Mr. Scrivner: Yes. (Hands pamphlet to Mr. Gallaher.)

Mr. Gallaher: Q. The only thing that you had in mind when you patented this was a resilient joint, wasn't it?

A. It was a joint that could be made without breaking the glass.



(Testimony of Mr. Fred Weber.)

Q. A resilient joint?

A. A resilient joint that allowed for expansion and contraction.

Q. And many of the all cement joints had been made before?

A. Yes, sir.

Q. And many rigid joints of the same kind had been made before?

A. I have never seen one to hold.

Q. But they have been made a great deal before?

A. They have been making them.

Q. I believe you state in your advertising they have been made pretty generally before?

A. I have made them, yes.

Q. And all you did was to patent the idea of the resilient joint, to overcome what you regarded the defect in the rigid joint. If this was a hard joint, that would not hold?

A. A small sample, like this, it might hold, but when you get it on a plate of the length required for these showcases, which reaches up to 12 feet, if the plate would receive a jar hard enough, it would not stick.

Q. That would be true if the cement or cushion between the two pieces of glass were of greater resistance than the glass, wouldn't it?

A. I didn't catch that.

The Court: There would be no resiliency if the material between the glass was of greater resistance than the glass, if he put something in there harder than glass, there would be no resiliency?

A. No, sir.

(Testimony of Mr. Fred Weber.)

Mr. Gallaher: Q. And, if it were harder than the glass, notwithstanding the non-resiliency, if you would strike the top plate the breakage or cleavage would stop when it came to that harder material, wouldn't it?

A. Yes, sir.

Q. And let the top glass break?

A. Yes, sir.

Q. And it would be also true, if it were not resilient, no cushioned effect at all to it, but of a less resistance, or of the resistance of red brick, that when you strike the top plate and break it, the breakage would stop at the red brick cleavage, wouldn't it?

A. If you had a hard joint, it would not.

Q. You know what red brick is, don't you?

A. Yes, sir.

Q. Supposing that it were of exactly the consistency of ordinary red brick?

A. Yes, sir.

Q. And you would strike this top piece, would you expect that the brick would break or that the side piece of glass would break?

A. I think the brick would break in that case.

Q. You say you can't make a rigid joint softer than the glass?

A. You can make it softer than the glass.

Q. How much softer?

A. I don't know to what degree.

Q. And you say in this book, however solid the joint may be, that the breakage will be there, don't you?

(Testimony of Mr. Fred Weber.)

A. I don't consider that joint solid. That is fairly rigid. This is not a hard joint.

Q. What is that composed of?

A. It is composed of a plastic cement.

Q. Examine it again and see whether it is composed of plastic cement, or not?

A. Hand me the different samples.

Q. That one I am handing you now, Defendants' Exhibit No. 4?

A. This is felt in here.

The Court: What is that?

A. This is felt in the cement.

Mr. Gallaher: Q. Now is that laminated felt and cement or it is penetrated or merged felt and cement?

The Court: Laminated would be something between—

Q. Try it with your knife and see if you find any difference in putting your knife through that and the rigid joints you have been putting it through. Quite a difference isn't there?

A. Some difference.

Q. Your knife simply goes through the felt. I will ask you whether or not that is not the Weber felt cushion joint?

The Court: What is that?

Mr. Gallaher: No. 4.

The Witness: I would consider that so.

Mr. Gallaher: Q. Now, to demonstrate to the court, I wish you would run your knife through No. 2, and don't run it through the place you did run it through before.

(Testimony of Mr. Fred Weber.)

A. It don't go as easy.

Q. Now that is a rigid joint, isn't it?

A. No.

Q. The same thing as number three?

A. I would not say positively until I saw No. 3 again.

Q. All right. Now let's see No. 3. Is it the same thing?

(Handing Defendants' Exhibit No. 3 to witness).

A. Practically, excepting it has a little more give to it, a little more cement in there.

Q. More cement in this?

A. I would think so.

Q. Or No. 5—

The Court: I don't know what you are talking about.

Mr. Gallaher: This is No. 5.

The Witness: And that is No. 3.

Q. Which has the most cement?

A. This here.

The Court: No. 5 has the most cement?

A. It looks so.

Mr. Gallaher: What is the other material there, if any, besides cement?

A. I can't see any in that. It cannot be discovered without breaking it apart.

Q. Can't be discovered without breaking it apart. Use your knife and find out. You found out what was in the cases at Webster Bros.

A. These joints are too close to put my knife in there. I don't care to break it.



(Testimony of Mr. Fred Weber.)

The Court: Run your knife through it, if you can.

A. It goes all right, only harder. That joint is not broken. It has to be resilient to do that.

Mr. Gallaher: Why do you say it has to be resilient to run a knife in there?

A. If it was solid and you put the knife in there, you are liable to break it.

The Court: Is not glass inelastic at all?

A. It is, in long lengths. You take glass four or five feet long and bend it probably half an inch, but in a small piece, the minute you bear on the edge you break it.

Mr. Gallaher: Well, now you say that the mere fact that you can run the knife through there shows that it is resilient, is that what you say?

A. That one particular one did give.

Q. If that piece of glass, if there was no cement or whatever is in there, on either plate, and the two pieces were up, like that, stationary, and there was a crack through there, you could run a knife through there, couldn't you?

A. Yes. If that was large enough you could run a knife through.

Q. Now, that is just as large as before you run the knife through, no larger or smaller. All you did was to push the cement or whatever material there was out of there.

A. Mr. Gallaher, if that cement was hard I would have broken the two pieces apart with this knife—probably the millionth of an inch.

(Testimony of Mr. Fred Weber.)

The Court: No. 5, was that?

The Witness: I couldn't say that there is any other material in there except plastic cement.

Mr. Gallaher: If there happened to be a strip of cloth in there, you don't know it?

A. I wouldn't know it, without breaking it.

Q. Now, if that was made with cement, of the consistency of which you make your case, would that cement ever become hard, I mean the cement, rigid?

A. Not for a long time.

Q. Then you mean to say that the cement which you use is resilient, not the same as this?

A. Not the same as this.

Q. Why then do you use the felt, if it makes a resilient joint without the felt?

A. Well, the strip of felt makes a more satisfactory joint. It is easier to place and you don't have to have the fitting on the glass quite so close.

Q. That is the only reason?

A. That is a very large reason. In straightening up the edges of the glass it is rather a hard job and the felt takes up the difference.

Q. Now, I will ask you again, if it is true, if you did that, that it would form a hard, practically homogeneous substance, thus destroying the resiliency of the felt?

The Court: What are you reading from, Mr. Gallaher?

Mr. Gallaher: I am reading from just below line 65 on the United States patent, in the specifications here.

(Testimony of Mr. Fred Weber.)

The Court: Page one?

Mr. Gallaher: Yes.

The Court: "The cement is applied to the felt superficially, forming a skin, as it were, on both sides of the felt, the body of the felt thus retaining its natural state. If the cement were applied to the felt so as to permeate the same, by uniting with the felt, it would form a hard practically homogeneous substance, thus destroying the resiliency." Is that what you are talking about?

Mr. Gallaher. That is it.

Q. Now that was true when you made the application for the patent?

A. Certain cement used at that time would make that hard.

Q. And it is true today, isn't it?

A. Certain cement would, not this cement.

Q. Not this cement. Now what cement do you mean?

A. You might take LePage's glue, or a fish glue, which is sometimes used, and if that permeates the felt, it will make it hard.

Q. Will anything else do that?

A. There may be other substances.

Q. Now, if that be true, why didn't you, when you were giving notice to the world of what could constitute an infringement of your patent, why didn't you say if the fish glue—if you used fish glue it will permeate the felt and make a rigid joint?

Mr. Scrivner: I object to that.

Mr. Gallaher: That is proper cross-examination.

(Testimony of Mr. Fred Weber.)

He has said fish glue and LePage's glue would do that. Why didn't you give notice in this patent that if a person used fish glue or LePage's it would bring about that result?

The Court: As I understand, he says those two gues would make it hard—or not make it hard?

A. Those two would make it hard.

Q. What cement were these cases made of that you examined that were manufactured by the defendant in this case?

A. Of the same cement that you have on these samples.

Q. What kind is it?

A. It is of a gummy substance.

Q. What make is it?

A. I couldn't say as to that.

Q. Is it one of the makes you have just now named that would make a hard, rigid joint?

A. No, sir, I don't think so.

Q. Why do you say that, if you don't know what cement it was?

A. I could only tell it by testing it with a knife. I couldn't say what it consists of.

Q. How long would it take the fish glue or LePage's glue you spoke of when used with the felt to become a conglomerate, hard mass and make a rigid joint, after it is put together?

A. Oh, that would take place in a very few days.

Q. How many days?

The Court: Quite a few days.



(Testimony of Mr. Fred Weber.)

Mr. Gallaher: How long would it take this cement that is used in Defendants' Exhibit 2 to harden?

A. I don't think that will ever get hard.

Q. Why don't you think so?

A. I have examined some of the cases this morning made by the defendants that have been in use for two years.

Q. Do you know if they were made with the same cement as this?

A. It looks the same.

Q. You don't know whether it is or not?

A. Well, no one can possibly tell that.

Q. Now, I suppose you mean by this notice to say that if the cement was in such a consistency as to permeate the felt, that it would destroy the resiliency—because it destroyed the resiliency of the felt, didn't you—that is what you wanted the world to understand, when you made this statement in your specifications.

A. That particular cement.

Q. Which particular cement?

A. I mentioned fish glue or other glue.

Q. But it says here "cement." Why didn't you say "fish glue"?

A. Well, that is all cement. You may take crockery cement, cement to cement crockery with.

Q. Now, did you know at the time you procured this patent that various cements were in themselves resilient?

A. Yes, sir.

Q. Do you know of any other way that you can

(Testimony of Mr. Fred Weber.)

determine now whether or not any of these joints that I have shown to you are resilient joints?

A. I don't know of any other way, other than what I have stated.

Q. Now, supposing that it were chalk, do you regard chalk as a resilient substance?

A. No, I would not.

Q. And if between the two layers of glass there were a piece of chalk, you would not have any trouble running your knife through it, would you?

A. No, but that is not a cement.

Q. No, but supposing that it were chalk, a layer of chalk, with layers of cement that you used, yourself, instead of using felt you would use chalk, is that what you would call a resilient substance?

A. You could not use chalk, it is impossible.

Q. Well, supposing that some foolish person would run out of felt and used a layer of chalk in the place that you used felt, would that, so long as the thing would stand up, be a resilient joint?

A. I can't imagine anybody foolish enough to try that.

Q. Mr. Weber, you understood my question, didn't you?

A. Well—

Q. Well, answer it then.

A. It is impossible, you could not.

Q. Is chalk resilient, according to your idea of mechanics?

A. I don't consider it would be, from my idea. I have never handled chalk.

(Testimony of Mr. Fred Weber.)

Q. Then, if somebody would make one of this sort, put a strip of chalk in between the two strips of cement, you could run a knife through that chalk, couldn't you?

A. But, you couldn't make a joint.

Q. You could run a knife through the chalk, couldn't you?

A. Yes, sir.

Q. And, it would not be resilient, would it, as you say chalk is not resilient?

A. If you put the chalk in that in any quantity it would be resilient.

Q. The instant the vibration came to the chalk it would stop, wouldn't it?

A. In the quantity you attempted to do it, it would be resilient.

Mr. Scrivner: Would that make a joint?

A. It could not make a joint.

Mr. Gallaher: Do you want this court to understand that, now the only way that you can determine whether a joint is resilient or a cushion joint, or not, is by using your knife and running it through the joint?

A. Well, that is the way we have done.

Q. Isn't this the real fact, that you thought that heat and cold would break the joint unless there was a layer of felt between the two layers of cement?

A. No.

Q. And, therefore, you thought that there could not be a good joint made without that cushion, felt, between them?

(Testimony of Mr. Fred Weber.)

A. The cushion felt makes the best joint. We make lots of smaller sized cases without the felt.

Q. Do you make any all-cement joints?

A. Yes.

Q. Are they resilient or rigid?

A. They are resilient, to a smaller degree.

Q. Well, then, coming back to that, do you use the same cement that you use on the top of the felt, and on the bottom of the felt?

A. Yes, sir.

Q. Why then do you warn the world not to use the cement other than by spreading it upon this cushion, if you know it would permeate and make a rigid joint?

A. By using the felt we get more resiliency on the sides of the larger case. In a small case such as six inches or a foot long, you can use the cement.

Q. Do you want the court to understand now, that, notwithstanding your specifications and claims, that this same cement that you use in making the cushion felt joint can be used without your felt or without any other substance except cement, and still be a resilient joint?

A. Yes, sir.

Q. Well, then will you explain to the court why you warned the world against using the cement and letting it penetrate the felt?

A. That is a different cement, entirely.

Q. Then, explain to the court why you didn't inform the world—

A. There are so many kinds of cement. I have only experimented with two.



(Testimony of Mr. Fred Weber.)

The Court: So far as you know, isn't that true of all cements?

A. Those I have experimented with, fish glue and also LePage's glue. I have made showcases in the experimental stage and the difference in the contraction and expansion bursted the glass, and I have known of some case manufacturers that have made similar experiments, in other parts of the country.

Q. I show you a "history of the Weber patent" and ask you to look at that and state whether or not you have read it, since that patent was issued?

A. I have read this, yes, sir.

Q. And its contents are true?

A. As near as I know. We didn't get this up.

Q. But you put it out as advertising matter. I desire to read just a part of it. "Mr. Gallaher: (Continuing) "Patent No. 801,944, issued to Fred Weber; the patent is for a showcase to be used in exhibiting small commercial articles for sale.

"Originally showcases were constructed with wooden frames having glass plates fixed in grooves in the frame. On account of the weight and appearance and for the purpose of permitting more complete display of the articles in the case, attempts were made to make an all-glass case. At first the glass plates were held together with metal clips or small bolts in the plates. Again, it was tried to glue or paste plates together without clips, bolts or screws, but on account of the rigidity of the case thus produced none of these were satisfactory to the trade. Weber conceived the ideal that an elastic or vibrating joint between these

(Testimony of Mr. Fred Weber.)

plates was essential to prevent breakage in moving, or from expansion or contraction caused by heat or cold. He attained this object by taking a piece of felt or other elastic material,"—I will just remark here that that other elastic material is covered by claim No. 2—"coating each side of the same with a thick cement, so that such cement would not permeate the felt, and it would thus retain its yielding or resilient qualities; the felt, with its coat of cement on each side, is then interposed between the edges of the plates of the showcase. The joints formed in this case have been found to prevent breakage, and in case one glass plate if broken, as by a blow, the cushion joint acts as a shock absorber, and the remaining plates will not be injured. This form of case also is easily repaired, as a thin blade can be introduced between the edges of the glass and run along the center of the felt, thus separating the plates. Commercially this is a great advantage because they can be shipped complete set up—something that cannot be done with any other all-glass case." Then there is some other matter. (Reads from Defendants' Exhibit No. 6.) Now the statement I read from the book is true isn't it?

A. That was made up by another company, not by myself.

Q. But you use it in advertising, as well as the other people?

A. No, sir.

Q. Why don't you?

A. We have no use for those books at all.

Q. Is there anything in it that is not true?

(Testimony of Mr. Fred Weber.)

A. No, I can't say that there is, to my knowledge.

Q. Then it is true that your conception was a piece of felt or other elastic material, with cement on either side of it, wasn't it?

A. My conception was to make a yielding joint, no matter how described in that book.

JAMES P. SHAFFER, called, sworn and examined as a witness on behalf of contestant, testified as follows:

Direct Examination

The Clerk: Please state your name?

A. James P. Shaffer.

Mr. Scrivner: Do you know the Diamond Patent Company, Mr. Shaffer?

A. Yes, sir.

Q. What is your relation to it?

A. I am president of the company.

Q. How long have you been such?

A. For the past 6 years.

Q. How much?

A. Six years.

Q. Have you had personal knowledge of the manufacture and sale of these showcases?

A. I am the manager of the Diamond Show Case Company, manufacturing under their license.

Q. The Diamond Patent Company owns the patent?

A. Yes, sir.

Q. And this Diamond Patent Showcase Company is the licensee?

A. Yes, sir.

(Testimony of James P. Shaffer.)

Q. And they are engaged in the manufacture of these cases?

A. Yes, sir.

Q. How long have they been engaged in that way?

A. Since 1908. The Diamond Patent Company was incorporated in 1910.

Q. Do you understand the construction and mode of operation of the case in this case, described in the Weber patent?

A. Yes, sir.

Q. Well, now, just describe it in your own way, briefly.

The Court: What is it you want him to describe?

Mr. Scrivner: The construction and operation of the patented device.

The Court: Your patent describes that. How can he add anything to the patent. The only question here involved is whether or not there is an infringement. We have settled that. Does he know anything about these showcases these people manufacture?

Mr. Scrivner. Do you know how they make them?

A. I know how they are made, from what I have investigated.

Q. Have you investigated the subject?

A. I have investigated a number of cases which they have manufactured and put out and are in use in the city of Fresno.

Q. For how long a period?

A. I can't tell exactly how long a period they have been in use. The first time that I made it a point to



(Testimony of James P. Shaffer.)

make a personal investigation of these cases was in the first part of May of this year.

Q. Can you describe how they were made?

A. They were made with a plurality of glass plates, the plates being spaced from each other with an intervening space between, with a layer of plastic cement, a layer of felt and a layer of plastic cement between intervening adjacent plates.

The Court: You say that the cases that the defendant manufactured are manufactured that way?

A. Positively, yes, sir.

The Court: It seems that makes it a prima facie case of infringement.

Mr. Scrivner: How many of those cases did you examine?

A. Well, I looked at them all. I made a personal, close examination of probably half the cases in the store, at different spaces, intervals, along the case.

Q. Mr. Shaffer, I will ask you if it has been your duty and is your duty as an officer of this plaintiff to examine all glass cases throughout the United States? To pass upon the question as to whether they were made in accordance with this patent or not?

A. Yes.

Q. How long have you been making that particular feature a part of your business?

A. Since the forepart of 1907.

Q. And how many different places here in Fresno have you examined the defendants' cases, the structure?

(Testimony of James P. Shaffer.)

A. I would say in the neighborhood of about a dozen.

Q. Well, now tell the court, in detail, what you did in order to make up your mind that these cases were made as you have said, and that they had resilient joints and were made in accordance with this patent?

A. In investigating these cases, the first principle which would apply, when we can clearly see the felt is to penetrate the joint with a knife, or an instrument similar to see whether the joint is elastic enough, soft enough in there to permit the instrument going through it. We cannot take the top off. Sometimes when we have a case in our factory we could jar it, probably, shake it, and by holding our hands on the edge of the plate we could feel the vibration of the plate, but you can't do that in a store, so the only real means left is for you to penetrate the joint, and I examined here in the matter of about a dozen different stores, and I was able to penetrate the joints in every store in some of the cases.

The Court: And that was all you did, was to just run a knife through?

A. That is all I could.

Q. Well, that is all you did?

A. Yes, sir.

JAMES P. SHAFFER, recalled as a witness on behalf of complainant for further examination, testified as follows:

Mr. Scrivner: Q. Mr. Shaffer, do you know what a rigid joint is in the showcase art?

(Testimony of James P. Shaffer.)

A. Yes, sir.

Q. Do you know what a resilient joint is in the showcase art?

A. Yes, sir.

Q. How is the difference determined, practically, I mean in the art?

A. My experience in the matter, the only way to enable you to determine, without separating the plate, would be to penetrate the joint, with a knife blade. In my experience I found that the resilient joints, the elastic joints, they are able to penetrate the joints with a knife blade, and on the rigid joints, solid joint, I was not able to do that.

Q. How long have you been carrying on your experiments in that line?

A. Ever since the first time I made a trip through the United States along in the latter part of 1906 when I started, and I have been continuously doing it ever since, making a good many trips throughout the United States and in all cities where cases were manufactured, visited large manufacturers and small manufacturers and seeing what they were making and putting on the market, and investigating to see whether they infringed the patent or whether they didn't, and making licenses to manufacturers, and taking a general survey of all the manufacturers and what they were doing in all-glass cases and other cases.

Q. Is that regarded as a safe and reliable test?

A. It has been with me, my experience, and everyone that I have come in contact with that knows anything about the cases, it has been the method followed.

(Testimony of James P. Shaffer.)

Q. What is the trouble with the rigid joint, socalled, in the art?

A. Well, I have found in the rigid joint cases, that they would not permit expansion and contraction of the glass, vibration of the glass in the showcase, and heavy trucks going along the street, and things like that, something bumped against it, people leaning against it, knocking it, or something like that, shaking it, the hauling of trucks and things, the rigid joint cases will not stand the wear and tear the elastic joint cases will.

Q. Do you know of any instance in this town of a case made by the defendants where the glasses are broken?

A. The only case in town where it is broken was one I saw the other night, in the drug company's place, which has a clamp on the cases, from my experience the break was evidently caused by the clamp.

Q. Was it made like these other cases except the clamp?

A. Yes, sir, like the Carr.

Q. Clamped case—elastic joint?

A. Yes, sir.

Q. Something like the Joplin case and Carr case?

A. Yes, sir.

Q. I am talking about this case here in town, the case in town where the glass was broken?

A. They have clamps, made the same as the patent case with the addition of another clamp.

Q. And the middle clamp caused the breakage of the glass, in your judgment?

(Testimony of James P. Shaffer.)

A. In my judgment that is what did it. It evidently did, in the case that I examined.

Q. Now, I think you testified that the defendants' cases here, that you had examined 7 or 8 of them, were elastic, in the case herein, the plastic joint?

A. Yes, sir.

Q. An infringement of the system described in this patent?

A. Yes, sir.

Q. In your judgment are infringements of both claims?

A. Yes, sir.

Mr. Scrivner: Take the witness.

*Cross-Examination.*

Mr. Gallaher: Q. You say the only way you have to determine whether the cushion is resilient or rigid is by thrusting a knife or other sharp instrument through the joint?

A. That is the only way you can determine in a man's store.

Q. And that is the only way you have determined, in all your experience where you found showcases in use?

A. Yes, sir, in stores.

Q. Now, you say if it is resilient that you can thrust a knife through, and if it is not resilient you cannot thrust the knife through? How do you know that?

A. My experience.

Q. When you stick the knife through you say that is resilient, don't you?



(Testimony of James P. Shaffer.)

A. Yes, sir.

Q. Why do you say that?

A. Experience has taught me I couldn't penetrate a joint, a hard joint, and if I cannot penetrate a joint with a pen knife I conceive it a hard joint.

Q. And you say you can thrust a knife through a resilient joint?

A. Yes, sir.

Q. And you can't thrust it through a rigid joint?

A. No, sir.

Q. How do you know you can't thrust it through a rigid joint?

A. From my experience that I have had.

Q. Well, what experience did you have that taught you that you can't thrust a knife through a rigid joint?

A. I traveled all over the United States and examined all kinds of cases, both elastic and rigid joints.

Q. Well, could you tell by looking at the case whether it was a resilient joint or not?

A. No.

Q. The only way you could tell was by thrusting a knife through?

A. In a man's store.

Q. If it goes through you say that is a resilient joint?

A. That is a resilient joint.

Q. Without knowing whether it moves or vibrates, the glass vibrates in its own plane, or vibrates without continuity of vibration through the joint, you simply say, if you can push a sharp instrument through it forms a resilient joint?

(Testimony of James P. Shaffer.)

A. Yes, sir.

Q. Suppose that joint were made of red brick, do you think you could thrust a knife through it?

A. I never tried that.

Q. Well, you have had experience in thrusting knives, evidently. Could you?

A. Until I try it, I would not say.

Q. Supposing it were chalk, could you thrust a knife through that?

A. If the chalk were pulverized and pasted in there—

Q. Suppose it were a square bar of chalk, thicker than a knife blade, could you thrust a knife blade through it?

A. There may be kinds of chalk—different kinds.

Q. The kind you used to write with on blackboards, could you?

A. Yes.

Q. Would that be a resilient joint?

A. Yes, sir.

Q. Why?

A. Because if it had a plastic cement on the sides it would give the resilient joint.

Q. If it had the plastic cement?

A. Sure.

Q. After all there isn't anything in that felt cushion at all, it is all in the cement?

A. Just as much in the felt.

Q. Why don't you use all cement?

A. We use the felt, principally, because in the manufacture of showcases it eliminates a lot of labor which

(Testimony of James P. Shaffer.)

is expensive. We do not have to be so particular about surfacing the edge of the plates and getting them true, removing the little bumps and things. The felt, being almost one-sixteenth of an inch thick, will take up a lot of that unevenness and do away with a lot of labor; and, also, it gives a greater degree of elasticity in there and permits of an easier operation when you come to repair it.

Q. You keep in mind all the time that this patent covered either felt or some other elastic material that was cemented on either side of the adjacent glass, don't you?

A. Yes, sir.

Q. And that is all it does cover, as far as you know?

Mr. Scrivner: That is the first claim.

A. One claim covers an elastic joint. The first covers felt or the equivalent. The second, as we make it, we use only a plastic cement.

Mr. Gallaher: Where are any of your samples of that kind?

A. I have none in town.

Q. Didn't you make any sample of that, to show to the court?

A. No, sir.

Q. In No. 1 claim it is felt. In No. 2 it is any other elastic material attached to the adjacent glass. That meant rubber or something of that kind, didn't it?

A. I didn't get that up. I don't know what the intention was.

Q. Now, your business for years has been to go

(Testimony of James P. Shaffer.)

about and see where all glass showcases are used, in business places?

A. Yes, sir.

Q. And sticking a knife through joints, if you could stick a knife through the joints.

A. Yes, sir.

Q. Did you find any in Fresno that you couldn't stick a knife through?

A. No, sir.

Q. Where have you found any that you couldn't?

A. I said I couldn't find any in those I have examined in Fresno. In defendants' cases I could stick the knife through.

Q. Elsewhere did you find any you couldn't stick a knife through?

A. I have found them in Kansas City and New York.

Q. When you can find one that you can stick a knife through, you immediately say from that and that alone that this is an infringement of our patent, don't you?

A. Yes, because it has got the elastic joint there.

Q. All right, I would like for you to explain to this court how it is that, on the one hand you say if you can stick the knife through it is resilient; and then you say it is resilient because you can stick the knife through and for no other reason. What does "resilient" mean?

A. I have no definition of it.

Q. You have no definition of it.

The Court: If you don't know what resiliency

(Testimony of James P. Shaffer.)

means, how can you testify it is resilient when you stick a knife through?

A. I mean the joints are plastic, elastic.

Q. Then resilience, in your idea, means elastic, is that it?

A. I never looked up the word, I always took it for granted.

The Court: I don't care what the dictionary says. I want to know what you mean by saying it is resilient?

A. I mean—resilient, plastic, elastic, all means the same thing, something soft in use, something I can penetrate. I couldn't penetrate concrete made of Portland cement with a knife, out here on the sidewalk, I wouldn't call that plastic.

Mr. Gallaher: Q. And the rest of your business has been, when you could run a knife through a joint, to demand a settlement of people for an infringement of your patent?

A. I would consider it an infringement of the patent and that we were entitled to bring suit against them to restrain them from making them.

Q. But that is your business, when you can find one you can run a knife through, to demand that the manufacture be discontinued, as an infringement of your patent?

A. Yes.

Q. You say that you thrust a knife through the showcases at Webster Brothers store here?

A. Yes, sir.



(Testimony of James P. Shaffer.)

Q. I believe you filed an affidavit in the preliminary hearing in this matter?

A. I believe so, yes.

Q. And in that you adopted Mr. Weber's affidavit as your affidavit, did you?

A. I am not positive of it.

The Court: The witness is entitled to see any papers he signed, offered as impeachment.

Mr. Gallaher: This is what is referred to. (Handing paper to witness.)

The Court: Is that your signature there?

A. It is printed. I presume it is.

Q. Sir?

A. It is printed here.

Q. Didn't you swear to it?

A. Yes, sir.

Mr. Gallaher: That is the copy that was served of your original.

Mr. Scrivner: There is no dispute about it, if Your Honor please.

The Court: We won't waste time on it, if there is no dispute.

Mr. Gallaher: Now, after refreshing your memory, do you remember if you thrust a knife through these, or was it Weber?

A. I thrust the knife through in the first part of May.

Q. Then you were not satisfied with that and went back again and tried it again?

A. After the defendant had sworn to affidavits

(Testimony of James P. Shaffer.)

denying it, I went back to affirm the proposition, to make sure.

Q. Then the first time you were not sure that it was a resilient joint?

A. I was sure the first time, and I was sure the second time.

Q. Now, I am going to make one more effort to get this clear. You answered Mr. Scrivner in this way, that the case was resilient—it was a resilient joint because if they were not resilient you couldn't thrust the knife through. That is true, isn't it?

A. If it is not an elastic, plastic joint you can't thrust a knife through.

The Court: You don't use the word "resilient." That is in the patent, isn't it?

Mr. Scrivner: It is not in the claims, if Your Honor please.

Mr. Gallaher: It is in the specifications.

The Court: Go ahead, Mr. Gallaher, I think you are entitled to a definite opinion of this witness, just what he means by it.

Mr. Gallaher: Now, you said if it were not resilient you couldn't thrust a knife through it, didn't you?

A. Yes.

Q. All right. Now how do you know that?

A. Experience that I have had, testing out these cases. I cannot poke a knife through a joint that is hard and solid and rigid.

Q. All right, if it is hard and solid and rigid, you can't force the knife through?

A. No.

(Testimony of James P. Shaffer.)

Q. Do you know that when it is hard and solid and rigid it is not resilient?

A. My experience with this kind of cases arose in my experience in manufacturing and seeing these cases.

Q. Well now, what shows you they are not?

A. For the simple reason that they break.

Q. Therefore, after all, the only contention that you make is that if the glass does not break within a short time, that it is a resilient joint?

A. I have no way of watching the cases continuously, to find out if the plate is going to break. I don't stand around the store for months and watch to see if the plates are going to break.

Q. I don't believe that you understand the peculiar situation with reference to that. Isn't it a fact that you determine that you can thrust a knife through it because it is resilient, instead of determining that the case is resilient by thrusting a knife through it? In other words, don't you have in mind, when you go to test a case, now, if this case is resilient I can thrust the knife through it. If it is not resilient I cannot thrust the knife through it. That is the idea with which you make the test, isn't it?

A. Yes, sir.

Q. All right. How do you determine to begin with, that if it is resilient you can do it, and if it is not resilient you can't do it?

A. By thrusting the knife through it. I have no way of determining the resiliency of the case until I test out the joints in it.

(Testimony of James P. Shaffer.)

Q. All right, and you do that by thrusting the knife through it?

A. Yes, sir.

Q. And from those premises and those alone you say your conclusion is that it is resilient, or you couldn't thrust the knife through?

A. Yes, sir.

Q. But you don't know any way in the world that you found out it was resilient?

A. I have no other way of testing a man's case out in the store. In the factory I could test it out definitely.

The Court: How would you test it out definitely in the factory?

A. In the factory, you can shake them around and jar them around and see if they will stand the jar or not.

Mr. Gallaher: Q. After all, what is really in your mind is, that a resilient joint is the only joint that will save the breakage of glass, if it breaks it is not a resilient joint, and if it does not it is a resilient joint? That is the fact?

A. If a man hits a plate of glass with a hammer we don't say it won't break, even in a patent case. We don't claim that. Or, if he runs a wheelbarrow into it, we don't. The patent claims and we claim that the elastic joint that we put in there eliminates the breakage from expansion and contraction and the ordinary little jars and things that it gets from passing trucks and things going along the sidewalk. We don't pretend to claim a case will not break if a man drops

(Testimony of James P. Shaffer.)

a hammer on it, or hits it with a hammer, or runs a truck into it, or something.

Mr. Gallaher: Now, I think I am getting to understand you. You claim if it is a resilient joint, the difference in the temperature in a room, the expanding and contracting of the glass will not break the glass, don't you?

A. If it is a resilient, elastic joint.

Q. Yes, and if it is not a resilient or elastic joint, that the expansion and contraction by reason of the temperature will break the glass?

A. If the temperature is so that the glass expands and contracts, it will break.

Q. Now, over here in Webster Brothers store you determined if those were rigid joints that those glasses would have been broken, didn't you, by reason of expansion and contraction of the glass?

A. Put the question again.

(Question read.)

A. If they had not had elastic joints they should have been broken.

The Court: You say they would have been broken, if they had not been elastic joints?

A. They should break from absolutely no other reason at all.

Mr. Gallaher: Then why did you have to make this knife test, if that was true?

A. For the simple reason, as I told you, that I have no means of actually knowing whether those cases had actually broken or not.



(Testimony of James P. Shaffer.)

Q. You didn't look to see whether they had broken or not?

A. I examined the joint. Those cases, he might have broken a plate by dropping something on it and he may have had it repaired, for all I know.

Q. And therefore, you had to use the knife test?

A. That is true.

Q. And that knife test has the double edged proposition to it, that if the joint is resilient, you can run a knife through—

A. Yes, sir.

Q. And you have no way of determining if it is resilient except by running the knife through?

A. Not in a man's store.

Q. And you have told this court now all that you can tell him to explain why you, as an expert witness, say that if it is a resilient joint you can run the knife blade through? You have explained it all to the court, haven't you?

A. All the reason is that an elastic, plastic joint will permit the knife to go in, and a hard joint, I have never been able to penetrate a hard joint with my knife. I have tried it in an eastern city.

Q. How did you find out that that hard joint was not a resilient joint, when too hard to run a knife through?

A. From the fact that afterwards it came out that those cases had been breaking.

Q. Did you see any of them broken?

A. Yes, sir.

Q. How many?

(Testimony of James P. Shaffer.)

A. Oh, I don't know exactly, several of them.

Q. Where?

A. Kansas City and New York.

Q. What place in Kansas City?

A. Well, some of those down there in Joplin, Missouri, of the Federmann people; and some in Kansas City—Royal Cigar Company of New York.

Q. You saw some of Federmann's broken, didn't you?

A. Yes, sir.

Q. The Federmann people are the people you collected royalty from, aren't they?

A. That we collected royalty from?

Q. Yes.

A. We never collected any from the Federmann Company.

Q. When you went there you found some of those broken?

A. Yes, sir.

Q. And those were hard joints?

A. Yes, sir.

Q. You determined that those were rigid joints because the cases were broken?

A. I couldn't stick the knife blade in them. One is simply a verification of the other.

Q. You don't know whether that is a rigid joint or a resilient joint, do you?

The Court: What are you showing him?

Mr. Gallaher: Defendants' Exhibit No. 3.

A. Not without trying it, I couldn't say.

(Testimony of James P. Shaffer.)

Q. The only way you have of trying it, is to run a knife through.

A. It is pretty hard, a small piece, like this, to determine exactly whether it gives or not. You can't tell whether your plates are giving, or your hands are giving. Can we try it?

Q. It don't make any difference to me what you do. Before you make any tests will you say whether that is rigid or resilient joint?

A. I will make a test before I say.

The Court: You can't say before you make the test?

A. No.

Mr. Gallaher: All right, make whatever test you want to make.

A. It is not of sufficient size to permit it. (The witness separates plates of sample.) There is plastic cement in there sufficient to make an elastic joint.

Q. Why do you say that?

A. Because it is soft.

Q. Because the cement is soft. Does it make any difference whether that cement was put in there a day ago or a year ago?

A. I cannot tell.

Q. If it was put in there a week ago would that be a rigid joint or a resilient joint?

A. If that stood, it would be a resilient joint.

Q. But, if it was put in there a week ago, what would that be by the time it was marketed as a show case, resilient or rigid?

A. If that is a week old, that sample, it would be a resilient joint.

(Testimony of James P. Shaffer.)

Q. And if the layers form a resilient joint, what is there in that besides cement?

A. I didn't examine it close enough for that. If you give it back, I will take another look. (Exhibit handed to witness.) It appears to be only plastic cement.

Q. Now basing your answer upon your experience as an expert resilient joint man is this true—the cement is applied to the felt, superficially, forming a skin, as it were, on both sides of the felt, the body of the felt thus retaining its natural state—is that true?

A. That is true.

Q. In the making of the show case under this patent?

A. Yes, sir.

Q. Is this true? If the cement were applied to the felt, so as to permeate the same, by uniting with the felt it would form a hard, practically homogeneous substance, thus destroying the resiliency of the felt. Is that true?

A. If the cement is of a plastic nature, it would not make—

Q. I asked you if this is true, if the cement were applied to the felt so as to permeate the same—go into the felt it would form a hard, practically homogeneous substance, thus destroying the resiliency of the felt? Is that true?

The Court: Answer that. That is right in the patent, isn't it, Mr. Gallaher?

Mr. Gallaher: Yes.

(Testimony of James P. Shaffer.)

The Court: Show him the patent, where you were reading.

Mr. Gallaher: I was reading from just below line 65, that sentence, beginning with the word "if," ending with the word "felt." I ask you if that sentence is a state of fact?

Mr. Scrivner: If Your Honor please, I don't wish to be technical, but he has no right to go into this kind of examination at this time.

The Court: Why not?

Mr. Scrivner: Why, because he has conceded everything but the infringement.

The Court: Well, let us find out what this witness knows about these things.

Mr. Scrivner: If Your Honor desires to know that, very well; but, having admitted everything but the mere fact of the infringement, he has no right on cross-examination to take up the question of the construction of this patent, with this witness. A specification only describes one way of doing a thing, and it covers every other way of doing the same thing, and accomplishing that result. A patentee is not required to tell every way, all the details of how his invention may be prepared. The statute itself requires only that he describe the best way he knows.

The Court: He is entitled to find out what the witness knows.

Mr. Gallaher: Can you answer that question?

A. Why, if plastic cement was used with felt, the plastic cement itself would make an elastic joint. I didn't write the patent out, but in my opinion, evidently



(Testimony of James P. Shaffer.)

the inventor had in his mind a substance such as glue, or something like that, which he had had experience with and found that was the case. And I would simply say that he should have added a different word there.

Q. Now, all right, I will ask you again if the cement were applied to the felt so as to permeate the same, by uniting with the felt it would form a hard, practically homogeneous substance, thus destroying the resiliency of the felt—is that true?

A. In some cements, yes.

Q. "The cement should be applied to the felt when quite thick, so that it will not soak into the felt." Is that true?

A. It should, yes.

Q. "Thus a laminated structure is produced comprising the two layers of cement, with an intervening layer of felt forming the yielding or resilient substance." Is that true?

A. Read it again, please.

Q. "Thus a laminated structure is produced comprising the two layers of cement, with an intervening layer of felt forming the yielding or resilient substance." "Any desired form of cement may be used for this purpose, and yielding or resilient substances other than felt could be employed, which selections are obviously embraced in the scope of my invention." Now is it true, in the patent, any desired form of cement may be used for that purpose?

A. Well, I would not say you could use Portland cement.

(Testimony of James P. Shaffer.)

Q. All right, is it true "any desired form of cement may be used for this purpose"?

A. As known in the show case art I would say—

Q. And is it true that any yielding or resilient substances other than felt could be employed?

A. Yes.

Q. And that is exactly what you have always understood to be meant by the second claim in the patent, isn't it?

A. Yes, sir.

Q. The first is that you could use felt for a resilient substance, and the second one, you could use any other substance?

A. I answered as to the second claim before you finished. I do not understand that the second claim covers the equivalent of felt, such as billiard cloth, or a piece of wood or rubber. I understand the second claim to cover a plastic cement, the first claim to cover the plastic cement with the felt, or the equivalent of the felt.

Q. Yes, that is what you understand it to be. That is the plain import of the thing. You testified in the case of Diamond Patent Company versus S. E. Carr Co., did you not?

A. Yes, sir.

Q. And you testified about the Federmann show cases in the Federmann drug store at Joplin, Missouri?

Mr. Scrivner: Well now, I object to reading that, unless we consider it in evidence. I am willing to that.

The Court: Ask the question, I will overrule the objection.

(Testimony of James P. Shaffer.)

Mr. Scrivner: Very well. We except.

(Question read.)

Mr. Gallaher: (Continuing.) Federmann Drug Company, in Joplin.

(Question read.)

A. I testified to the Federmann Drug Company cases, yes, sir.

Q. And did you not say in that testimony that the material used in the construction of the Federmann cases, whatever it is, permeates the felt, making a solid jointed case, which was not the case in the patent?

A. I can't tell, until I look at it again.

Q. All right. Will you look at the quotation in the testimony?

A. I did not testify to that.

Q. You didn't testify to that. However, you do say that when it permeates the felt it makes a practically solid, homogeneous matter, which destroys the resiliency of the joint?

A. With the glue that was used in those cases. The testimony that he refers to, Your Honor, is Mr. Shaffer's.

Q. Mr. C. L. Shafer. All right. Now you say that if the cement is of that resistance only that will permit the thrusting of the knife blade through the cement, that that was proof that it is a resilient material?

A. Yes, if I can thrust a knife blade through it.

Q. And which way would that cement be put on, in order to be in that condition, would it be more viscous or less viscous than that required to make what you would call a rigid joint?

(Testimony of James P. Shaffer.)

A. What do you mean by the word—

Q. Viscous?

A. Yes.

Q. Tough, it would mean of a more substantial consistency, less watery, less liquid.

A. You would have to keep it from permeating the felt, in a laminated structure, use a heavier consistency that will not penetrate as much as in a liquid form; in a liquid, like glue, it will penetrate.

Q. All right. Now you say that you can make, of course, a joint that is all cement?

A. Yes, sir.

Q. Very well, that will hold the case together so that it can be moved about, and will contain the articles of merchandise on exhibition?

A. Yes, sir.

Q. Which joint will still be resilient?

A. Yes, sir.

Q. And also you can make one of cement, like that, which will be rigid, no resiliency whatever. That is true, isn't it?

A. Yes, sir, not with the same kind of cement.

Q. Now, if you were to get an order for an all-cement joint, one lot of cases to be all-cement, resilient joints, and the other lot of cases to be all-cement, rigid joints, what kind of cement would you use in order to make the resilient joints?

A. I would use the plastic cement.

Q. Well, what would that be, less tough, more yielding?

A. Yes, sir.

(Testimony of James P. Shaffer.)

The Court: Non-plastic?

A. It would be plastic. To make a resilient joint I would use plastic cement.

Mr. Gallaher: What do you mean by "plastic"?

A. Something that is made up with a foundation of soft gum, the foundation of plastic cement.

Q. And what would you use for the other?

A. I would not make the other.

Q. If somebody wanted to pay you \$100,000.00 for a case two feet square and wanted what you describe as a rigid cement joint, what would you use for that, what cement?

A. If he was foolish enough to do it, I would probably use a thin liquid, LePage's glue, to do it, and as thin as I could.

Q. Is there any cement that you could use?

A. They call LePage's glue—they sell it, as I understand, in another form under another label and call it Russian cement, but I understand it is nothing but LePage's glue, which is practically the same thing.

Q. Which is best, LePage's glue or the cement you speak of?

A. I didn't make it, I have no way of determining.

Q. How would you find out which one to use if you were going to make this hundred thousand dollar case?

A. From the experience I have had I would know what to buy.

Q. What is that?

A. I would say the foundation of this is of a plastic nature.

Q. Why?



(Testimony of James P. Shaffer.)

A. Because I can't crumble it up in my hand. It is sticky and yielding. After you work it around in your hand it becomes sticky and plastic.

Q. Do you want the court to understand that the specifications as used for the purpose of questions, to you, were misleading?

A. Misleading to me?

Q. Yes, misleading to the public.

A. No. I don't think that it is the intention to mislead the public. I think the inventor's intention there was to mean if you used liquid LePage's glue in the manufacture of show cases and used it in a laminated structure, putting it on that way, soft stuff in a very liquid form, it would penetrate; and if used in the right consistency it would penetrate enough to become hard, because LePage's glue becomes hard—glue becomes hard.

Q. Wouldn't anything become hard that is sufficiently liquid to permeate the felt, wouldn't it become hard if it ever made a joint at all—it would have to become hard, wouldn't it?

A. Well now, our cement permeates the felt just on the outer side of the layer, it has to take hold of the fibers.

Q. But you say in the specification and claims it must be laid on the outside of the felt, so as not to permeate it. That is correct, isn't it?

A. So as not to permeate it.

Q. It attaches to it, but does not permeate the body of the felt?

A. It is attached.

(Testimony of James P. Shaffer.)

Q. Now if anybody does make a glue that permeates the body of the felt, necessarily that makes a homogeneous rigid material?

A. Not if you use the plastic cement.

Q. Well, you say there were two ways—under claim 1, using a felt cushion; under claim 2 using some other elastic material, like rubber?

A. I did not. I put that all under claim 2.

The Court: Under claim 2 they use only cement, I understand.

A. Yes, sir.

The Court: Under claim 2 they didn't use anything but cement.

Mr. Gallaher: I think that is all.

The Court: I want to ask you—in this case here, Diamond Patent Company vs. S. E. Carr Co., it is stated: 'It is true that in the claims no specific mention is made of the nature of the adhesive substance that is used, but the claims do in effect say that the plates are so cemented to the felt that each plate is adapted to freely vibrate in its natural plane of vibration, and prevented by the felt cushion from imparting this vibration to the adjacent plates. This result could not be obtained without the use of an adhesive cement that would not penetrate the cushion and destroy its elasticity and the specifications plainly call for the use of such a cement. The appellee's contention that a patentee can claim nothing beyond the terms of his claim'—it don't matter about that. Now, the last sentence: "This result could not be obtained without the use of an adhesive cement that would not penetrate the

(Testimony of James P. Shaffer.)

cushion and destroy its elasticity, and the specifications plainly call for the use of such a cement." Do you understand the patent to be that way?

A. Well, I don't get the whole meaning of it. Could I read it?

The Court: Yes, you read it. Start right in there—"It is true" and read right down there, those two sentences there. (Handing decision in the case cited to witness.)

A. It is pretty hard for me to answer that yes or no.

The Court: Well, make any explanation you desire.

A. In the beginning of the manufacturing of show cases, experiments carried on at the beginning were with liquids, such as LePage's glue, and fish glue and such things, and it was found there that where you used a porous substance like we were using at that time, a very thin felt, or thin porous felt, that it would penetrate and make a hard joint, which would break, and we tried to manufacture it and couldn't that way. Then we took a plastic cement, and since we started to manufacture with plastic cement, in these later years we have discovered that where we used plastic cement, even with ground up felt, you are practically getting a half-way proposition from the first claim and the second claim, putting the ground up felt in the plastic cement that would give us a yielding joint that would stand up and perform all the functions of the first or second claims.

The Court: What is a plastic cement?

A. A plastic cement as used in show cases is a cement which has a foundation of yielding substances,

(Testimony of James P. Shaffer.)

incorporates a soft gum that does not become brittle in its natural state.

Q. Soft and yielding, is that the idea?

A. Not soft and yielding like putty, and neither is it hard, like concrete, but it comes to a sort of rubber substance.

Q. What kind of cement is that? What is it called in the trade, what name does it bear?

A. Well, so far it does not bear any, we manufacture it ourselves.

Q. You manufacture it yourself?

A. Yes, sir.

Q. For all the show case market?

A. We make it and no other manufacturer's licensees make it.

Q. How do you manufacture that? Is it a secret?

A. We have never yet advertised it, for this simple reason, other people getting hold of it would manufacture it. At the beginning, Mr. Weber used to make it, himself; and as we got more licensed manufacturers we had a paint firm make it for use, and the paint firm—I think the foreman quit and went to another place, and since then that firm has been making it and putting it out broadcast, selling it to all these people, and that is what has caused these people to infringe so much, because they have been able to get the proper kind of cement. It has caused us a great deal of trouble. It is a hard thing to overcome. Since then, when they did this—this fellow quit and did that, we started in manufacturing it ourselves, tried to overcome this fellow's sending it out broadcast. The cement is not pat-

(Testimony of James P. Shaffer.)

ented. It is made from secret things which no one knows except the inventor and the Diamond Patent Company.

The Court: That is all, for me. Call your next witness.

Mr. Scrivner: We have no other witness now, if Your Honor please.

The Court: I will look at the cases at the noon recess.

C. F. MURRAY (one of defendants), called, sworn and examined as a witness on behalf of defendants, testified as follows:

Direct Examination.

My name is C. F. Murray. I am pretty hard of hearing; I am one of the defendants in the case, and the owner of the Murray Cabinet and Furniture Company, of Fresno. We manufacture all glass show cases.

Mr. Gallaher: Q. Just explain to this court how you make the joints of those cases.

A. Well, we started—when we first commenced to make them we used a thin felt strip, about three-sixteenths wide, and we used a thin cement, which was so thin that we could—it would hardly stay on a putty knife—had to keep it rolling around when we picked it up and put the cement on the upper edge of the glass, and then laid that felt in on top of it and pressed it down, and coated it over again with the cement and then pressed it down with the natural weight of the plate, which takes care of that. And the upright cor-



(Testimony of C. F. Murray.)

ners we used a clamp to clamp it and hold it in place until the cement hardens.

Q. And did you use a strip of felt that was of equal width with the thickness of the glass?

A. No, we don't be particular about that, never cut it over a quarter of an inch wide and even narrower than that. The cement certainly does penetrate or permeate the felt, and after it is formed and set the felt and cement so mixes as to be a conglomerate mass of felt and cement. It makes a rigid joint. I never made any cases where we used a piece of felt and put on it a cement of sufficient hardness that it would not penetrate the felt. We sold some cases to Webster Brothers Drug Store in this city. I think they are in the store. The joints in those cases were made as I have described the making of joints; solid joints.

Q. What is the purpose in using a little strip of felt, wood, or anything else in connection with those joints?

A. It ain't necessary at all. We can use heavier cement, leave everything out, the felt or anything else out. It is not necessary at all.

Q. Explain what, if anything, the felt did do when you did make them that way?

A. If we put it on that way, it would simply keep it so the felt won't be forced out—I mean the cement won't be forced out, clear down, if we put in anything at all. In using that thin cement you had to put something in so it would not force the cement all out. We wanted some of it left there, sure. The only purpose in using felt or anything else in there, was because

(Testimony of C. F. Murray.)

of the unevenness of the plane, and the cement was so thin that when it was put on alone it would "squash" clear out, if it was not put in there; that was the only purpose of it. I never found any trouble with rigid joints; I never had any objection to them. I now use a more viscous or harder cement, and don't use any other material than the cement itself. I never bought any cement of Mr. Shaffer or Mr. Weber for that purpose. I don't use theirs. We did make it ourselves for awhile. I never made an all-glass show case with the cushion or resilient joint.

Cross-Examination.

I did live in Los Angeles. Never worked for Mr. Weber. I have been in his shop. I never examined his cases at all; never saw any being made. I know pretty near how they are made. He makes them with a cement just as he describes in his application; he puts the cement on both sides of the felt and lays the felt between the plates. It makes a cushion joint; I mean by "cushion joint" that the cement don't penetrate, don't meet in the center, leaves fiber in there.

Q. What is the effect of that on the glass plate?

A. I don't know, no particular effect at all, I don't think.

Q. Then there is no difference in your mind between a rigid joint and resilient joint?

A. It don't amount to a snap of your fingers.

Q. The question is, and I want you to understand it fully before you answer it—in your opinion now, as a manufacturer of all-glass show cases, is there any dif-

(Testimony of C. F. Murray.)

ference in the effect or purpose of having a plastic, resilient joint, or a solid, rigid joint?

A. I can't see how it would make any difference.

Q. Then the idea, according to your information, of putting felt in the cement at all is useless?

A. Yes, I think so.

Q. Now how did you make your joint here at Webster's store, for instance?

A. I think we used a thin felt and then cement.

Q. Now you put on first a cement, did you?

A. Yes, sir.

Q. On the edge of the plate?

A. Piled it up on the edge of the plate.

Q. Piled it up on the edge of the plate?

A. Yes, sir.

Q. That is, the side plate?

A. That is the edge of the plate or end of the plate, either one.

Q. Then you were prepared to put on your top plate?

A. Yes, sir.

Q. You piled up the cement on the edge of the plate. How thick was the plate?

A. About a quarter of an inch.

Q. You piled that up there in a cone shape, I suppose?

A. Yes, sir, in a cone shape.

Q. What did you do next?

A. Put our felt in next.

Q. On top of this?

A. Yes, we did, in this case.

(Testimony of C. F. Murray.)

Q. Now the glass is about a quarter of an inch. How wide was the felt?

A. The felt was less than a quarter of an inch.

Q. How much less?

A. We don't know. We took a pair of shears and cut it. It may vary a little.

Q. May be a little less or a little more?

A. Yes, may be a little less or a little more. We don't want it stand out.

Q. Sometimes a little more than the width of the glass?

A. Yes.

Q. And sometimes a little less?

A. Yes, sir.

Q. You paid no attention to that?

A. No, sir.

Q. A matter of no importance?

A. No, nothing particular about that.

Q. When you get the felt on top of this cone shaped cement, you put a layer of cement on top of that?

A. Yes, sir.

Q. And then what did you do, what did you do next?

A. Put the plate on.

Q. Put the plate on, and then what did you do?

A. Lay the plate on and press it down.

Q. Lay the plate on and press it down until it gets down?

A. About the right force.

Q. Well, now that cement is a soft, plastic material, isn't it?

(Testimony of C. F. Murray.)

A. Yes, sir, soft material.

Q. Now, I want to know if you haven't then got an all-glass show case, having the edges of the adjacent plates—a plurality of plates, you have a plurality of plates?

A. Yes, sir.

Q. The edges of each are spaced from the adjacent plate, spaced from each other, do not jam up?

The Court: They admit that.

A. The space is taken up with the material put in.

Mr. Scrivner: A felt cushion filling the space between the adjoining plates? Haven't you a felt cushion filling the space?

A. We have a felt there, but no cushion.

Q. You have a felt?

A. Yes, we have a felt.

Q. What do you mean by a cushion, as contradistinguished—it is made out of felt, isn't it, a felt cushion?

A. Well, it is—yes—without anything else with it.

Q. That is between the top edge of the plate and the side of the plate?

A. Yes, sir.

Q. And they push, one against the other—one pushing against the other?

A. When the felt lays in the cement, it is no cushion. After it is pressed down, it is no cushion.

Q. If the cement is soft and plastic, don't it tend to make a cushion?

A. No, sir, you can't do it.

Q. Well, you have the stuff there, anyway, the felt?



(Testimony of C. F. Murray.)

A. Yes, the stuff is there.

Q. And the upper layer of cement?

A. Yes, sir.

Q. Now what is the thickness of your felt?

A. Well, I couldn't tell you. It is very thin. You can hold it up and see right through it—ordinary, cheap felt.

Q. Now you say, in your judgment, that that plastic material with that piece of felt and another layer of that kind of plastic material on top, that it is absolutely a rigid joint?

A. Yes, sir.

Mr. Gallaher: Q. I hand you here a strip of felt and ask you whether or not you have seen that before?

A. Yes.

Q. What is that?

A. That is a piece of thick felt we took off the show case that Mr. Weber's people made.

Q. Took it off a show case the Weber people make?

A. Yes. It has their card on it.

Q. Is that the condition in which it was when you took it out of the show case?

A. Sure, only this side went to the wood, that was glued on. That is glue there.

Q. That is the famous LePage glue?

A. Yes.

Q. And the one on the other side is the cement?

A. Yes, sir. And there is the cushion joint, right there, plain, in view.

Q. And that is the felt that they specify as making a cushion joint, is it?

(Testimony of C. F. Murray.)

A. That makes the cushion joint.

Q. Now, instead of that, your cement is put on in such a state as to absolutely penetrate and permeate that felt?

A. Yes, sir.

Q. And make a solid mass?

A. Yes, sir. We never use that thick felt.

Q. Your felt is quite thin, I understand?

A. Yes, sir.

Mr. Scrivner: We desire to introduce this in evidence.

Q. Where do you get this cement?

A. Buy it.

Q. Where?

A. From Fuller & Co. We purchased a formula to make it.

Q. Have you that formula?

A. No, it is up in San Francisco.

Q. When was Fuller & Co. making that cement for you?

A. When? We used to make it ourselves for quite awhile, and then we concluded they had machinery for mixing it and could make a better cement than we could make by hand. I think we bought it from them for two or three years.

JAMES A. SMART, called, sworn and examined as a witness on behalf of defendants, testified as follows:

Direct Examination

By Mr. Gallaher:

(Testimony of James A. Smart.)

Q. Kindly state your name.

A. James A. Smart.

Q. Where do you live?

A. Fresno.

Q. What is your business?

A. Manager of the Murray Show Case Company.

Q. And how long have you been in that business?

A. Since July, beginning of July, first of July.

Q. Have you had any experience other than with that company in the manufacture of all-glass show cases?

A. Yes, sir.

Q. With whom?

A. Why, with Murray, in Los Angeles, and also with the Weber Showcase and Fixture Co.

Q. How long with the Weber Company?

A. About 6 years.

Q. And what years were they?

A. Prior to coming up here.

Q. Do you know the construction of the Weber show case?

A. Yes, sir.

Q. Explain to the court the construction of the joint in the Weber show case.

A. The construction of the joint is absolutely as—

Mr. Scrivner: I object to that, at this stage of the proceedings, as not being material.

The Court: Let us find out what this witness knows. It is for the purpose of finding out what he knows about it.

A. It follows out the pamphlet that they have, as

(Testimony of James A. Smart.)

near as possible. They use a thick felt and a thick cement, in order to form a cushion joint.

Q. What part of the joint is a cushion?

A. The felt.

Q. And is the cement put on in such a manner as to permeate the felt?

A. No, sir, it is not supposed to saturate the felt at all, otherwise it would destroy the cushion.

Q. And do you know the construction of all glass show cases made by Murray Cabinet and Furniture Company

A. Yes, sir.

Q. Do you know the construction of those in the Webster Drug Store in this city?

A. No, sir, I do not.

Q. Just explain what the construction is of the cases being manufactured by the defendant Murray Show Case Company.

A. It makes a solid joint.

Q. Well, explain how it is composed?

A. Composed of cement. In fact, they were using a real thin felt until I came up here, and I told them not to use any felt at all, to use nothing but cement, because a rigid joint of cement is just as good as felt would be.

Q. Do you know what the construction of their felt joint was that they were making?

A. They used a thin felt, they showed me they used a thin felt.

Q. What character of cement?

(Testimony of James A. Smart.)

A. Regular cement that we made. We made it for a long time.

Q. Can you say whether or not in the manufacture of their cases the cement permeated the felt?

A. Yes, sir, we endeavored to make a thin cement.

Q. And I will ask you now if it is true, in order to make a cushion joint the cement shall be applied to the felt superficially, that they put a skin, as it were, on both sides of the felt, so that the body of the felt will retain its natural state?

A. Yes, sir.

Q. Is that the way, and the only way to make the cushion joint?

A. Yes, sir.

Q. Is it also true if the cement were applied to the felt so as to permeate the felt by uniting with the felt, it would form a hard, practically homogeneous substance, thus destroying the resiliency of the felt?

A. Yes, sir.

#### Cross-Examination

Mr. Scrivner:

Q. What cases here in town do you know that the defendant Murray made?

A. Made the cases for the Owl Drug Store. They are made with solid joints; made with cement, not felt, in the joints. I never saw the Murray Company make any cases before I came up here. We put on the cement with a putty knife, on the upper edge of the plate.

Q. And use a piece of felt on top of that?

A. A piece of felt, on the top of that cement, and



(Testimony of James A. Smart.)

on the top of that another layer of cement that penetrates it.

Q. How do you know that it penetrates?

A. Because I can take a putty knife and penetrate it. We tried it.

Q. Is it all a hole?

A. No, sir, it is not all hole. It penetrates where the hole is; it penetrates the felt.

The Court: I thought you said awhile ago you didn't put any felt in there.

A. I did, on these samples, yes, sir. I made these samples and we did, but we manufactured it in Los Angeles. We can penetrate the felt with a putty knife.

The Court: He is asking you what you did here.

A. We use nothing but the cement now, since I have been here.

Q. Since the suit was commenced you changed the program?

A. Since I came up here. I don't know anything about when the suit was commenced. My testimony, so far as the manufacture of these show cases are concerned, only goes to that period of time, since July this year. I know nothing about what occurred prior to that time. I don't know how they were built, or what the effect was, whether solid or elastic joints.

#### Redirect Examination

Mr. Gallaher:

Q. For the purpose of this witness' information, I hand you Defendants' Exhibit No. 1. Did you make that?

A. Yes, sir.

(Testimony of James A. Smart.)

Q. What is that?

A. That is an all-cement, in my estimation, all cement. I would not say for sure.

Q. Would that be rigid?

A. I don't remember those—yes, sir, it should be.

The Court: Let me see that. In this No. 1 may there be a thin layer of felt in it?

A. Possibly, it is hard to tell, looking at it.

Q. If that has a thin layer of felt in it, it is so united with the felt, the cement so united with the felt that it cannot be determined from looking at it.

A. No, sir.

Q. And makes the rigid joint mentioned in the specifications?

A. Yes, sir.

Q. Is that your memory of the matter?

A. Yes, sir.

Q. Refreshing your memory from that, which is—

A. That is No. 1, Your Honor.

Q. With the thin felt, but you couldn't determine that. No. 4. I wish you would look at that and see if you can say what that is.

A. That is a cushion joint.

Q. That is a cushion joint?

A. Yes, sir.

Q. And you made that, did you?

A. Yes, sir.

Q. Which is the cushion joint. And the joint made with the thin felt permeated by the cement, as illustrated by Exhibit No. 1. This is Exhibit No. 4 of the defendant in this case.

(Testimony of James A. Smart.)

A. Yes, sir.

Q. No. 4 being a cushion joint?

A. Yes, sir.

Q. With the felt cushion there, and No. 1 being the thin felt, permeated by the cement, making the rigid joint?

A. Yes, sir.

Q. There are the two illustrations. Do you recall whether you put any other material in any of these other than—No. 2, I want to show you that. What is the composition of that joint?

A. That is wood.

Q. Wood, with the cement attached to the wood?

A. Yes, sir, making also a rigid joint.

Q. Making also a rigid joint?

A. Yes, sir.

The Court: No. 2 is wood, you say?

Mr. Gallaher: Yes, sir. I want to ask one more question. There is one of them missing, for some reason, that I didn't have yesterday. You made one of lead, did you?

A. Yes, sir.

Recross-Examination.

Mr. Scrivner: Q. Well now, you say the way you make them now you don't use any felt at all?

A. No, sir.

Q. What sort of cushion do you make?

A. Thick cement.

Q. Plastic?

A. I don't know what the word means.

Q. Soft?

(Testimony of James A. Smart.)

A. Yes soft, pliable.

Q. It gives, yields?

A. Yes, sir.

Q. Has that got any felt in it?

A. No, sir.

Q. No felt ground up and made in it?

A. I didn't make it.

Q. Do you know where you get it?

A. Yes, sir.

Q. Where do you get it?

A. Frisco.

Q. Fuller & Co.?

A. Yes, sir.

Q. You don't know how it is made?

A. No, sir.

The Court: It must have, necessarily, resilience. It is like rubber, you squeeze it together and it comes back. That means elasticity.

Mr. Scrivner: Yes, it is elastic.

The Court: That is what it says. Plastic material does not mean cement, at all. "An elastic material filling the space thus existing between the nearest adjacent surfaces of the plates." It must be an elastic material.

Mr. Scrivner: Oh, yes—in the second claim.

The Court: The first claim is felt or its equivalent. And the second claim, it must be any elastic material, the term "elastic" being used in the patent. You say, on the second claim, on the other page: "Any desired form of cement may be used for this purpose"—that is, to keep the purpose in view—about line 75. "Any

(Testimony of James A. Smart.)

desired form of cement may be used for this purpose, and yielding or resilient substances other than felt could be applied." That contemplates cement and the resilient substances.

Mr. Scrivner: It don't mean fastened or screwed to it, attached, placed on it.

The Court: Stuck on, it has got to stick—stuck in some way.

Mr. Scrivner: Yes, but, being plastic, when there is a vibration, shaking of the glass, or anything—

The Court: No use talking about "plastic" because you have "elastic."

Mr. Scrivner: Well, it means the same thing. It couldn't be elastic if hard.

The Court: I don't know about that. You can take a marble and throw it down here on this hard pavement and you can bounce it over your head easily enough; but if you go out on the asphalt and throw the marble down, it won't bounce, it sticks right there. That illustrates that asphalt is not elastic, while the concrete is elastic.

Mr. Scrivner: Well, the word "elastic" there of course has to be construed with reference to the specifications, the purpose for which it was intended. Now, in this case, we have not bothered much about the second claim, because we were prevented—

The Court: That second claim comes up in the proposition. As near as I remember you said—they claim they are not doing it now. You couldn't have an injunction if you don't prove they are now doing it.

Mr. Scrivner: Well, we don't know.



(Testimony of James A. Smart.)

The Court: He said they are not.

Mr. Scrivner: Well, our rights are to be determined on that subject by what the condition was at the time the suit was commenced. We don't know whether they have quit or not, and they might not stay quit. I think I can show Your Honor authorities on that. I want to ask him a little about the second claim. We don't waive that. We think they have infringed both, but, having proved the infringement, clearly, of the first claim, we don't consider that so very material; but, under Your Honor's suggestion it might be more so.

Q. Now you have, in what you are making now, a structure comprising a plurality of glass plates, haven't you?

A. Yes, sir.

Q. You have an unconfined edge of one plate nearly but not quite meeting another plate also with unconfined edges?

A. Yes, sir.

Q. And an elastic material filling the space thus existing between the nearest adjacent surfaces of the plates? What do you say to that?

A. I don't say it is elastic. When the cement gets set, it is hard, it is not elastic at all.

Q. How is it when you put it in?

A. Thin, you can use it with a putty knife, in order to cement it.

Q. How could you tell it was hard?

A. Because I have been in there since and know it is hard. It is standing in the store yet.

Q. What did you do to find out it was hard?

(Testimony of James A. Smart.)

A. I tested the edges. It has been standing in the store. The settling of the top squeezed out some of the cement, and it was perfectly hard.

Q. That which was exposed to the air was perfectly hard?

A. Yes, sir.

Q. How was it in the joint?

A. I didn't test it in the joints.

Q. Do you know what the elements of that cement are?

A. No, sir.

Q. How do you know it is not elastic, or whether it is elastic or not elastic?

A. When we put up a case we generally have some laying out on a piece of broken plate and work off that, and let it stand a time until it gets perfectly hard. That is why I say it gets hard.

Q. You don't put it in after it is hard?

A. No, sir, but generally there is some left on the glass.

Q. Did you ever try to put your knife through one of these joints that you made, that you call solid?

A. Yes, sir.

Q. Can you do it?

A. Yes, sir.

Q. Then that material will give?

A. Pushes the material out, the knife does. You can shove a knife through.

The Court: Does the material come back and fill up the space?

A. No, sir.

(Testimony of James A. Smart.)

Q. It leaves a hole?

A. It leaves a hole, yes, sir, from pushing out so much. I have seen it, it sticks together, in one position. If you shove a knife through it shoves that right out with it.

Q. Where is that show case?

A. In the Owl Drug Store.

Q. Oh, the Owl Drug Store. How could you tell that remained, when you run your knife through, the hole remained?

A. I could see the hole, by looking.

Q. How long after you put your knife in there did you look at it?

A. When I pulled the knife out.

Q. You don't know whether it filled up later or not?

A. No, sir.

Q. Now is it your idea that those glass plates, top and sides and so forth cannot vibrate without conveying its vibration to the adjoining plate, but is solid?

A. Solid, to all appearance, yes.

Q. To all appearance, but answer my question. I will read this so you can understand it: "Said plates being attached to the elastic material, whereby the plates by reason of their unconfined edges and the intervening elastic material can each vibrate or move in any direction independently." Does that condition exist in these that you make?

A. Not that I know of.

Q. You don't know whether it does or not?

A. It might be so small it would not be noticeable.

(Testimony of James A. Smart.)

Q. You can't notice any vibration in the glass plate can you?

A. You can in the large plate, yes, sir.

Q. Sometimes, you can't always, owing to the size?

A. If the size is large enough you can see it vibrate.

Q. But in a glass two feet square it would have to be a very powerful vibration, to see it?

A. Yes.

Q. The depression of the glass would be practically impalpable, you couldn't see it?

A. Yes, when it is a large plate.

Q. Then, as a matter of fact you don't know whether these plates in the cases you are making now, whether the plates by reason of their unconfined edges can vibrate or move in any direction independently of each other, you don't know whether that is so or not?

A. No, sir.

Q. If it is so, there would be a cushion joint there, wouldn't there?

A. I couldn't say.

Mr. Scrivner: You don't know.

Mr. Gallaher: That is all.

The Court: Now, gentlemen, I will meet you at one o'clock and go and see these things.

Mr. Scrivner: Now, about the procedure. I suggest that we go, take the reporter and the clerk. It won't take only half an hour, and Mr. Shaffer has been sworn, and let him point out the cases that we want to show you, all in a given building. We want him to show you that he can, with his knife blade, penetrate

these things, and show you the felt, in some cases, the edges of the felt, and just show the case as it is.

Mr. Gallaher: The court will know what the court wants to see, and we will have no trouble finding the cases.

The Court: Take the reporter, witness and clerk. Let the clerk, reporter and witness be here at one o'clock to start together.

Mr. Gallaher: And Mr. Smart, I would like to have him go along as a witness.

The Court: Anybody go that wants to.

#### AFTERNOON SESSION.

(At one o'clock p. m., the court, the clerk, the reporter, attorneys for the respective parties, accompanied by the witnesses Shaffer, Smart and others, proceed from the court-room to the store room of The Black Package Company, 1025 K street, Fresno, and first inspect a show case said by the proprietor, Mr. Black, to have been manufactured by the defendant Murray.)

Mr. Shaffer: You can readily put a knife in here.

Mr. Smart: (After inserting knife blade between edges of plates of case.) Sometimes they are close together, and sometimes farther apart. In the routine of manufacturing, they don't very much care, because it is not important. There is a joint there, and the cement and stuff fills it up.

The Court: Is there any felt in this?

Mr. Smart: I don't know. I wasn't here when this was made. You can't tell—

Mr. Shaffer: There is felt in this joint.



Mr. Smart: (Referring to material extracted from space between plates of glass in case.) There is some of it.

Mr. Gallaher: That is permeated with the cement. You can't find the felt.

Mr. Scrivner: (Referring to material picked out of space between plates of glass by Mr. Shaffer.) What is that you picked out there?

Mr. Shaffer: A piece of felt in its natural state. Here is another piece.

Mr. Gallaher: You say that is not permeated with the cement?

Mr. Shaffer: The cement is on the outside. When you are crumbling it this way you are crumbling the cement. It is not the felt. This case is made exactly the way the patent calls for.

Mr. Gallaher: You say that is felt?

Mr. Shaffer: That is a piece of pure cement.

Mr. Gallaher: Where is the felt?

Mr. Shaffer: You have shaken it off.

Mr. Gallaher: There is another piece. There is the whole business. If that is not permeated, I can't see. (Hands material to the court.) I will leave it to His Honor whether that felt is permeated.

Mr. Scrivner: Show that to the judge, Mr. Shaffer.

The Court: I see this case has got a wood back.

Mr. Smart: Yes, all show cases have—99% have wood in the back.

The Court: The patent does not call for it.

Mr. Shaffer: Not the claims. It don't specify that in the claims, but the show case always has the wood back.

The Court: What is the name of this store?

Mr. Gallaher: Black's Package Company, 1025 K street.

Mr. Smart: Try your knife on this, Your Honor, and see whether that is hard or not.

Mr. Scrivner: Mr. Shaffer, is that an elastic joint, within the meaning of your patent?

Mr. Shaffer: Yes, sir.

The Court: You are of the opinion it is not?

Mr. Smart: I would state the cement is absolutely hard, right here, for instance, where the knife was stuck in there. As I stated, you shove the stuff out when you put a knife in there; and there it is.

The Court: When was this put in here?

Mr. Smart: I wasn't sure, I don't know.

Mr. Weber: They tell me about two years and a half ago. That is the statement of Mr. Black, the proprietor of the store.

(From the store of the Black Package Company the court and parties mentioned proceed to the store of Webster Brothers, incorporated, at the corner of Van Ness boulevard and Mariposa street, for the purpose of inspecting the all-glass show cases therein.)

Mr. Gallaher: These are from the Murray Cabinet and Show Case Company.

The Court: What is this store?

Mr. Shaffer: Webster Brothers.

The Court: Defendants in the case.

Mr. Smart: (Referring to noise made by court rapping on show case.) You can make that noise on any case.

The Court: Mr. Murray testified there was felt in this?

Mr. Scrivner: Oh, yes, no dispute about that, in these cases.

Mr. Shaffer: Some of them you can see it on the edges, and others you cannot.

Mr. Gallaher: The only question in this case is, whether they come within the warning of the specifications. If the cement permeates the felt, it makes a rigid joint. The testimony was it was a rigid joint.

The Court: How are you going to determine whether it is a rigid joint or not? One side says it is and the other that it is not. How am I to tell?

Mr. Gallaher: Mr. Scrivner and I will help you all we can.

Mr. Scrivner: Both our witnesses testify if it is soft enough so that you can stick your knife in it that it is an elastic joint.

The Court: That is his recognition of it. Now, in the second claim it says: \* \* \* "Whereby the plates by reason of their unconfined edges and the intervening elastic material can each vibrate or move in any direction independently." Now I don't see how a glass—that glass can move independently in any way. How can that move? It don't move, it is the vibration. Which is it, vibrate or move? It has to vibrate or move.

Mr. Scrivner: It don't mean the plate moves, Your Honor, that it—

The Court: That is a plate and this is a plate—"Whereby the plates by reason of their unconfined edges"—this edge is not confined, that is, the way I

look at it—"unconfined edges and the intervening elastic material can each vibrate or move in any direction independently." Well, now, "move in any direction"—that is a material part of the patent.

Mr. Scrivner: "Vibrate or move."

The Court: How can that glass vibrate?

Mr. Scrivner: Suppose there was an earthquake—anything that might jar this. There is very little elasticity in glass, if it is held so solid that it can't give.

Mr. Gallaher: You hit that glass, and that glass, and you will hear a vibration there, and that is the thing the patent says will not happen with their show cases.

The Court: I can feel a vibration there, all right.

Mr. Shaffer: Here is one place where you can see the felt.

The Court: He has testified there is felt in there.

Mr. Shaffer: You can see the felt there.

Mr. Gallaher: You can see this vibrate too, and that is what you say won't happen.

Mr. Shaffer: No,. If you were to take a show case and the goods were not in here and rack the whole thing, all the plates would vibrate. Then would you say—

Mr. Gallaher: If that was a true felt, you could push it a little to one side.

Mr. Shaffer: Not in our show cases.

Mr. Gallaher: You can feel it vibrate, with the finger, all right. (The court taps side glass plate of show case.)

Mr. Smart: It would naturally vibrate, on account of the wood.

Mr. Smart: There is a piece of the material I got out of that.

Mr. Gallaher: If that is not permeated, I don't know what you could call permeated.

Mr. Scrivner: What is that?

Mr. Shaffer: That is a broken top.

Mr. Smart: Are you going to take a piece of the top off?

Mr. Weber: Have you got a glass cutter?

Mr. Smart: Yes—no, I have not. I thought I had one in my pocket.

Mr. Shaffer: They have taken off that other plate. That joint has been taken off there. That is right down to the glass, but you look in there and you will see there is some thickness to it.

Mr. Smart: Here is where it proves the glass is narrower than the felt. The cement is on both sides of that.

The Court: The patent calls for the two pieces of glass to come together. I don't think this proves anything.

Mr. Smart: Just the hardness of the cement, that is all.

Mr. Gallaher: And the permeation of the felt by the cement. That is all we are trying to prove by this.

The Court: (After inserting knife blade between side and top plates of case.) That looks like there is some substance between the glass; some substance between the two glasses. (To Mr. Smart.) There is where you put your knife through.

Mr. Weber: Here is some of the material.



The Court: We will have to move along and get back to court in half an hour.

(From the store of Webster Brothers, incorporated, the court proceeded to the store of Buker & Colson Drug Company, incorporated, and there inspected an all glass show case manufactured by the Diamond Patent Show Case Company; and from the store of Buker & Colson Drug Company to the store of the Phone Drug Company, 1034 J street.)

Mr. Shaffer: This job was put in by Murray & Company, and they were paid for it—I don't know, some year or two ago.

Mr. Gallaher: Who manufactured it?

A. Murray, at least they paid the damages when we sued them.

Mr. Smart: You didn't sue them.

Mr. Shaffer: We started to, or threatened to.

(The parties next visited the store of the Owl Drug Company, on the corner of Tulare and J streets.)

Mr. Shaffer: We have some of our show cases here, and some of these are manufactured by Murray.

Mr. Smart: Some old ones here sent down from Frisco. I think I could pick out one, though.

The Court: One that you say there is no felt in?

Mr. Smart: That is made without any felt in.

Mr. Shaffer: This is one that they made. This is one that you put in when the store opened up, wasn't it?

Mr. Smart: Yes.

Mr. Shaffer: This other one you put in since?

Mr. Smart: No. They were all made at the same

time, all of them. All the cases I made, I made at the same time, excepting that little case over there.

Mr. Shaffer: Did you make the case with the sponges in?

Mr. Smart: Yes, sir.

Mr. Shaffer: And put it in at the same time this was brought in?

Mr. Smart: Yes.

Mr. Shaffer: Did you bring it in at the same time?

Mr. Smart: Not the same day.

Mr. Shaffer: Mr. Castner, manager of the store, said it was not.

Mr. Smart: Mr. Murray can say about that, himself. He helped make it. It was not put up the same day, possibly, or delivered. This cement is as hard as the rest. That is the same, absolutely the same cement. Some places the glass is closer together than others, and some places further apart. The cement is the same texture, absolutely.

Mr. Shaffer: (Removing some of the material from the space between the plates.) Here is some cement removed from the joints. When you work it with a knife—

Mr. Smart: Where did you get that?

Mr. Shaffer: In one of those cases.

Mr. Smart: Put it in the palm of your hand and heat it. If there is any substance in there, any oil, or anything like that, it will warm up. You can't get away from that.

The Court: Is there no felt in this at all?

Mr. Smart: No felt.

The Court: Did this come out of this case?

Mr. Shaffer: Yes.

Mr. Smart: There is some when it is warm. If your hand is warm and sweaty, it will warm up and get softer.

Mr. Shaffer: It is very soft, and sticks to the knife.

The Court: Can you get in there and poke some of that out?

Mr. Smart: (After complying with the request of the court and handing him the material thus obtained.) That stuff is not absolutely set yet, because the case has not been in here long enough.

The Court: How long has it been here?

Mr. Smart: Since the Owl opened up.

The Court: How long was that?

Mr. Smart: I don't just remember, about two months, I should judge. I don't remember exactly.

This case came apart here and we took it apart temporarily until we could fix it. (Removes some of the cement from inside of case and hands it to the court.) Here is some more, off the top, that I took off the top. It is not thoroughly set.

(The party here returns to the courtroom, and the following proceedings were had and the following testimony taken.)

JAMES P. SHAFFER, recalled for further examination, on behalf of complainant, testified as follows:

By Mr. Scrivner:

Q. Now, referring to that case down here at the Owl Drug Store, made by Smart, describe that again, Mr. Shaffer, state what you saw there, and how it was made, constructed and operated.

(Testimony of James P. Shaffer.)

The Witness: The case at the Owl Drug Company's store in which the different articles were, such as sponges, chamois and so forth, that merchandise, was constructed with plastic cement. I took my own knife and punctured the joint very readily, and also removed quite a little of the cement, and it was pliable by the knife, on my hand, or between the fingers. It is the same that we construct cases with under the second claim of the patent.

Q. Did you pass the material you took out of the joint over to the court?

A. I did.

The Court: You say it is a plastic material. What do you mean by that, plastic?

A. Well, it is soft enough for a knife to penetrate into it.

Q. That is what you mean by plastic?

A. Yes, sir.

Mr. Scrivner: I will ask you if that was an elastic material, elastic?

A. Yes, sir, elastic.

The Court: Now, what do you mean by "elastic"?

A. Something that will yield to penetration of a pen knife point, pen knife blade.

Q. That is your idea of what elastic means?

A. Yes, sir.

Mr. Scrivner: Was it a yielding substance?

A. Yes, sir.

Q. Or resistant—resilient?

A. Yes, sir.

Q. So that it would form, in case of the vibration

(Testimony of James P. Shaffer.)

of the plates, either one, the upper or the lower—a cushion joint, so to speak?

A. Yes, sir.

Q. What do you mean by a “cushion joint”?

A. A cushion joint is something that is soft or pliable enough to penetrate with a knife, and takes up the vibration and expansion and contraction generally, in such cases.

Q. You mean that it would give when the glass vibrated, this stuff would give and let it vibrate?

A. Yes, it would give, under expansion and contraction.

Q. So as not to break?

A. Yes.

The Court: Well, now, Mr. Scrivner, this calls for an elastic materials. I tried to explain, this morning, what the meaning of elastic material is. I suppose that is used in the common acceptation of the term. I don't know if the witness knows anything about what elastic material is, or is not. He has not qualified as a chemist—showcase man, it is true; but in order to prove that is elastic, I should think there would have to be some sort of chemical analysis of it. I have mashed it down and it stayed mashed down. There is no resiliency to it that I can see. You mash it down, and it stays where you put it. It don't seem to me like that has any elasticity to it. I think it is fair for me to say what I see about it. It is a sort of soft gum. For instance, you take a piece of chewing gum, I don't understand there is any elasticity to it. It is soft and pliable, but elasticity is a different thing from things



(Testimony of James P. Shaffer.)

that are soft and pliable, and stick. The words used are "elastic material." That is what your claim calls for. It does not call for simply a soft, yielding material.

Mr. Scrivner: Yes, but in the specifications, the description, you can determine—you have to look to that to determine what is meant by the word "elastic," and that is a yielding substance, laminated structure.

The Court: Resilient joint, "an elastic or resilient joint which eases the strain at the actual union or contact-faces of the plates, thereby also greatly softening the effects of shocks received by the case." Now, so far as I can see from this thing, if that case has a shock that knocks it down it will stay there. I can't see how it will spring back.

Mr. Scrivner: Any desired form of yielding or resilient substance other than felt.

The Court: Where are you reading now?

Mr. Scrivner: About 75—on the second column—on the first page.

The Court: "Any desired form of cement."

Mr. Scrivner: Yes. —"may be used for this purpose and yielding or resilient substances other than felt could be employed." Now then, we will see he used the word "elastic" in the second claim.

The Court: I told you what occurred to me. It is not up for argument. This is a question of your proof.

Mr. Scrivner: Well, there is no way to prove this thing except by the opinion of an expert. Now this gentleman is an expert, and we can only prove by

(Testimony of James P. Shaffer.)

him that there is no other way to do it. Now, here is a patent, that is, for the purpose of this case, admitted to be valid and admitted to be a useful and complete proposition, covers what it says, protects this man in something, and the only issue here now is one of fact.

The Court: Sure, whether or not this thing—for instance, take this case down at the Owl Drug Store, whether that case is described in your patent.

Mr. Scrivner: Now then we say it is.

The Court: Yes. It is not up for argument now. Go ahead with the evidence.

Mr. Scrivner: Now, to go over it again, to get, maybe a better understanding, you have here this plurality of glass plates—

The Court (To the clerk): I wish you would mark this as Court's Exhibit 1. This is a piece of the substance between the glass and the show case at the Owl Drug Company's store.

Mr. Scrivner: Yes, just mark it.

The Court: He will mark it. Go ahead with your case.

Mr. Scrivner: I wanted to show it to the witness. You have there the yielding material, the unconfined edges of one plate nearly but not quite meeting the other—

Mr. Gallaher: Well, we will admit that. The court saw it.

Mr. Scrivner: I have to start somewhere. Now, the elastic material filling the space thus existing between the nearest adjacent surfaces of the plates—now, I

(Testimony of James P. Shaffer.)

call Your Honor's attention to this language in the specifications: "Any desired form of cement may be used for this purpose." I will go back a little. "The cement is applied to the felt, superficially, forming a skin, as it were, on both sides of the felt. . . . .  
 "If the cement were applied to the felt" and so forth. Pass that. "The cement should be applied to the felt" and so forth. I will skip all that. "Any desired form of cement may be used for this purpose, and yielding or resilient substances other than felt could be employed, which selections are obviously embraced in the scope of my invention." Now, if Your Honor please, you will notice down to the words "the yielding or resilient substance" belongs to the first claim. The whole of that has reference to the first claim. Now, the only part of the specification that applies to the second claim are the words, "any desired form of yielding cement may be used for this purpose, and yielding or resilient substances other than felt could be employed, which selections are obviously embraced in the scope of my invention." Now, that is all there is in the patent in the second claim.

The Court: You read that wrong, there is nothing about "yielding cement." It is "Any desired form of cement may be used for this purpose."

Mr. Scrivner: "Any desired form"—that belongs to the first claim,—“of cement may be used for this purpose.” That is the purpose of applying it to the felt, for this purpose. That has already been described. Now, I say, the balance of that says: “and yielding and resilient substances other than felt could be em-

(Testimony of James P. Shaffer.)

ployed, which selections are obviously embraced in the scope of my invention." Now, a man don't have to describe every way to use his invention. Your Honor is, no doubt, familiar with that.

The Court: Well, the case is not up for argument, get through with the witness.

Mr. Scrivner: Where is this exhibit, have you marked it?

The Clerk: Here is the Court's Exhibit A.

Mr. Scrivner: Now, look at that and state if you know what it is. What is it?

The Clerk: That is Court's Exhibit A.

A. That is a piece of cement, removed from one of the joints of the Owl Drug Company's case.

Q. Now, is that, in your opinion, a yielding or resilient substance?

A. Yes, sir.

Q. Which is termed in the second claim as an elastic material?

A. Yes, sir.

Q. Well now, tell how that operates, how it does, in fact, operate in the device.

Mr. Gallaher: We object to that as having been gone into, both in examination in chief and cross-examination.

The Court: Not with this particular material. Objection overruled.

A. It acts as a cushion in the chain to prevent the shocks of the plates communicated from one to another, and to permit of expansion and contraction of the plates.

(Testimony of James P. Shaffer.)

Mr. Scrivner: Now, as a matter of fact, can, if necessary, the plates constituting the top and the sides of the case, by reason of their unconfined edges, held apart by this stuff, the Court's Exhibit A, and the intervening plastic material you have been shown, in the middle, can these plates vibrate or move in any direction, independently? No difference how small or how great, can one move independently without transmitting its movement to the other plate?

A. Yes, sir.

Q. Upon what do you base that conclusion?

A. I base it on the fact, one fact, that the showcase will stand the ordinary use put to in stores, and the different climatic conditions it is subjected to, which make vibration or expansion or contraction, and the plate will expand or contract. It may be a very small part, and may need a very fine instrument to record the amount of movement there is in there.

Q. Mr. Shaffer, I will ask you, whether there is any other reason that you know and can state to the court why this stuff you have got there makes an elastic joint?

A. It makes an elastic joint for the reason that it is plastic.

Q. In your opinion, does the words "elastic material" mentioned in claim two contemplate that yielding or resilient substances other than felt, referred to in the second claim of the first page of the patent?

A. Yes.

Mr. Scrivner: That is all.



(Testimony of Charles F. Murray.)

CHARLES F. MURRAY, one of defendants, recalled as a witness on behalf of complainant, testified as follows:

Direct Examination

Mr. Scrivner:

Q. Mr. Murray, when did you employ Mr. Smart?

A. About 6 months ago.

Now you have made some change recently, have you, in making these devices?

A. Yes, a little.

Q. When was that?

A. Oh, since he came up here.

Q. Since he came up here you made any as you described this morning?

A. Yes.

Q. Such as you described this morning?

A. Yes.

Q. You have not ceased permanently to make them that way, have you?

A. No.

Q. And you make them both ways now?

A. What do you mean by "both ways"?

Q. With the felt and without felt.

A. Yes.

Q. Do you expect to continue to do so?

A. Yes.

Q. You have no reason now to suppose you will not continue to do so?

A. No, sir.

Q. Now why have you ceased to make them all with felt in the joints—some without felt in the joints? In

(Testimony of Charles F. Murray.)

other words, why do you make them without felt in the joints at all?

A. Because I think it is the best way to make them.

Q. According to your judgment it is the best way?

A. Yes, sir.

Mr. Scrivner: That is all.

Mr. Gallaher: No questions.

The Court: I would like to ask your client a question. Are you done?

A. Yes, sir.

The Court: I would like to ask your client a question.

Mr. Scrivner: Which one?

The Court: Mr. Gallaher's.

Mr. Gallaher: Mr. Murray is the client, not Mr. Smart.

JAMES A. SMART, recalled for further examination by the court, testified as follows:

Direct Examination.

The Court: This substance in the showcases at the Owl Drug Store, do you claim that will get hard?

A. Yes, sir.

Q. How long will it take to get hard?

A. Well, where it is squeezed out to a thin layer, where the glass fits close enough together, as it should be, it will get hard in say about three months, two months—three months—all depends on the heat or the cold, of the weather. In cold weather I would say it would take longer. Where it is thick, for instance, where the cases come apart, the instance over there in

(Testimony of James A. Smart.)

particular, we cemented the cases one night and delivered them next morning. They were absolutely fresh, they were in a hurry for them, and we had to go over there and shove in some cement, without taking the cases apart, filled it in with a putty knife, to hold it until we got a chance to go down some night and do it at night. That is the condition of the case we saw.

Q. How much space is there between the glass, the edge of the glass and the side of the glass in those cases?

A. Ordinarily there should be about one-sixteenth.

Q. How much is there there?

A. Some one-sixteenth and some more, some about one-eighth, where all that cement was in.

Q. Apart?

A. Yes, sir.

Q. And you say that gets perfectly hard?

A. Yes, sir, perfectly hard and brittle.

Q. You say it gets brittle?

A. Yes, sir, it is sandy.

Q. When you mash it down, will it spring back where it was before?

A. No, sir.

Q. It will not?

A. No, sir, it won't spring back. As the glass settles down—as you put the top on, it settles down. If the weather is warm it gradually works out and down to a thin, even surface.

Q. Won't it finally break up and come out?

A. No, sir, unless they move it around a good deal.

The Court: That is all.

(Testimony of James A. Smart.)

Cross-Examination

By Mr. Scrivner:

Q. How long have you been actually making these cases, of that description, where you use nothing but the cement?

A. I have only been making them, practically, since I came up here.

Q. About how long is that, how long has it been since you began the work of making those?

A. I have made them a good many years and experimented, and had men experiment for me.

Q. I understand that, but we are confining ourselves to the art now, what you have been doing here in Fresno. When was the first one you made?

A. The Owl Drug Store was the first of them I made, since I have been here.

Q. When was that?

A. About two months ago, I should judge.

Q. Is that hard and brittle?

A. Some of them are.

Q. Well, that one at the drug store?

A. That one that we took the cement out of—no, because it is fresh.

Q. Well, then there is one at least, that is not hard and brittle?

A. Part of it.

Q. Part of one case where the material is not hard and brittle?

A. Yes, sir.

Q. How do you know how long it will take that particular case, for the joint to get hard and brittle?

(Testimony of James A. Smart.)

A. I can't say how long it would take that particular case.

Q. Now name one particular case here in Fresno where the material has become absolutely hard and brittle?

A. I don't know as there is any hard and brittle, absolutely, that I made.

Q. Well, that is what we are talking about, what you made. You said those you made got hard and brittle.

A. Yes, they do.

Q. Well, where is one of them?

A. They are not here. You asked me when I made them up here.

Q. Yes, and I asked you where one was, where we could go and see it?

A. You can see them down at Los Angeles.

Q. None of them you have made up here in six months are hard and brittle?

A. I have not been here 6 months.

Q. Well, in three months?

A. I have only made them 2 months.

Q. They have not become hard and brittle yet?

A. No, sir.

Q. How did you come to leave the employ of Mr. Weber?

A. Mr. Murray had been after me for about two years to come up here.

Q. What did he tell you he wanted you here for?

A. He wanted me to take care of the business. He said he was old and wanted to quit the business.

Mr. Gallaher: That is all.

The Court: Well, proceed with the argument, gentlemen.



The plaintiff hereby proposes the foregoing as its abstract of the testimony taken in the above entitled cause and prays that the same be allowed and settled by the court pursuant to the provisions of Equity Rule No. 75.

J. J. SCRIVNER, and  
GEORGE E. HARPHAM,  
Attorneys for Plaintiff.

The foregoing statement is hereby settled and approved by me this 29th day of March, 1917, together with defendant's proposed amendments thereto filed March 23, 1917, which are to be inserted in the printed transcript in their proper place.

TRIPPET,  
Judge.

Settled and filed Mar. 29, 1917.

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Petition for appeal in due form filed Jany. 30th, 1917, and allowed by order of court, entered Jany. 30th, 1917, on filing an undertaking on appeal for \$500.00, and need not be printed in this record.

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[TITLE OF COURT AND CONSOLIDATED CAUSES.]

### **Assignment of Errors.**

Now comes the Diamond Patent Company, the plaintiff in the above entitled actions, and files the following assignment of errors upon which it will rely in the United States Circuit Court of Appeals for the Ninth Circuit, and which it will also rely upon in its appeals in the above entitled causes, viz:

First: Error of the court in holding that an injunction should not issue, when it appeared that the defendants had ceased to use the alleged infringing device or devices subsequent to the bringing of the above entitled suits.

Second: Error of the court in holding that the bills of complaint in these causes are without equity and adjudging and decreeing that said causes be dismissed.

Third: Error of the court in holding that the devices made, used or sold by the defendants did not infringe the plaintiff's patent, nor either of the claims thereof.

Fourth: Error of the court in not adjudging and decreeing that the devices made, used or sold by the defendants infringed plaintiff's said patent, and in not granting to the plaintiff the relief prayed for in the bills of complaint on file in said causes.

J. J. SCRIVNER,

G. E. HARPHAM,

Attorneys for the Plaintiff, Diamond Patent Company.

Filed Jan. 30, 1917.

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I, Wm. M. Van Dyke, clerk of the United States District Court, hereby certify that the foregoing printed transcript is a full, true and correct copy of such papers and parts of papers as the parties have stipulated shall be printed in the record.

WM. M. VAN DYKE,

Clerk of the U. S. D. C.

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IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

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DIAMOND PATENT COMPANY (a Corporation),  
Appellant,

vs.

WEBSTER BROS. (a Corporation), and C. F. MURRAY,  
et al.,  
Appellees.

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**APPELLANT'S OPENING BRIEF.**

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J. J. SCRIVNER and  
GEO. H. HARPHAM,  
Attorneys for Plaintiff.

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The James H. Barry Co.  
San Francisco

**Filed**

AUG 21 1917

**F. D. Monckton,**  
Clerk.



IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT.

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DIAMOND PATENT COMPANY (a Corporation),  vs.  WEBSTER BROS. (a Corporation), and C. F. MURRAY, et al.,	}	<i>Appellant,</i>          <i>Appellees.</i>
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**APPELLANT'S OPENING BRIEF.**

This suit is for the infringement of United States Letters Patent No. 801,944, issued to Fred. Weber, dated October 17th, 1905. The patent relates to show cases generally known in the market as "all-glass cemented show cases."

The improvement resides mainly in the means of fastening one glass surface to another glass surface. The object of the invention is to do away with drilling holes through the glass and to dispense with metallic or other fastening devices which were commonly used at the corners for holding the plates forming the case together and to provide a fastening which will



unite the parts so securely that they cannot be separated except by such stresses or blows as would break the glass before accomplishing the dismemberment, although by the use of a proper tool the parts may easily be separated.

Another object is to provide for a certain amount of elasticity at the joint, whereby a cushion effect is produced. If the parts were rigidly united, severe shocks received by the show-case would tend to shatter the plates or displace the parts; but in the present invention the cushion joint aids in maintaining the union of the parts, affording, as it does, an elastic or resilient joint, which eases the strain at the actual union or contact faces of the plates, thereby also greatly softening the effects of shocks received by the case.

The defendants answered and relied wholly upon the question of infringement.

## THE PROOF.

The evidence in this case is almost wholly parol, and the witnesses introduced by the plaintiff were James P. Schafer (the President of the plaintiff corporation) and Fred. Weber (the inventor and patentee).

The defendants introduced as witnesses in the case C. F. Murray, one of the defendants, and James A. Smart, an employee. The defendants also introduced several small models to illustrate their contention.

It was stipulated at the trial that the question of infringement was the only question to be tried before the Court; all other issues made by the complaint being conceded.

## THE INVENTION.

The patent and the invention therein described is very plain and in no manner difficult to comprehend. The patent has been before the Courts in many cases, and before this Court in the case of *Diamond Patent Company v. S. E. Carr* (reported in the 217 Fed. Rep., page 400).

There are two claims in the patent, which we reproduce for the convenience of the Court:

“CLAIM 1. A structure comprising a plurality of glass plates, the edges of which are spaced from the adjacent plates, a felt cushion filling the space between the adjoining plates, the plates being cemented to the felt, each plate being adapted to freely vibrate in its natural plane of vibration, and prevented by the felt cushion from imparting its vibration to the adjacent plates.

“CLAIM 2. A structure comprising a plurality of glass plates, an unconfined edge of one plate nearly but not quite meeting another plate also with unconfined adjacent edge, an elastic material filling the space thus existing between the nearest adjacent surfaces of the plates, said plates being attached to the elastic material, whereby the plates by reason of their unconfined edges and the intervening elastic material can each vibrate or move in any direction independently.”

The patent is found on page "16" of the transcript and with the description therein contained and the drawings attached to the patent, the Court cannot fail to comprehend the patent, and we think no further discussion of the invention is necessary at this time.

We might here add, however, that it appears from the record in this case that this invention has gone into very extensive use throughout the United States; that the plaintiff has licensed many manufacturers in many States, who are manufacturing and paying royalties to the plaintiff, and that, after much litigation and contention over the same, the trade has finally, almost universally, come to acquiesce in the validity of the patent; its utility and value, and they have generally ceased to attempt to infringe it.

It will be apparent from the testimony about which there is no dispute, that the two named objects of the invention mentioned in the quoted paragraphs of the patent are:

*First:* To do away with drilling holes through the glass, and to dispense with metallic or other fastening devices formerly used at the corners for holding the plates forming the case together, and to provide a fastening which will unite the parts so securely that they cannot be separated, except by such stresses or blows as would break the glass before accomplishing the dismemberment; although, by the use of a proper tool the parts may be easily separated in this patented case;

*Second:* To provide for a certain amount of elasticity at the joint, whereby a cushion effect is produced, for it is well known that if the parts are rigidly united severe shocks received by the show case would tend to shatter the plates or displace the parts.

The first claim covers a structure in which the edges of the glass plates are spaced from the adjacent plates, a felt cushion filling the space between the adjoining plates; the plates being cemented to the felt, permitting the glass plate to freely vibrate in its natural plane of vibration, without imparting such vibration to the adjacent plates, and permitting of a sufficient amount of expansion and contraction of the plates, to prevent breakage.

The second claim covers a similar structure, where the joints between the plates are made up simply with an elastic material filling the space existing between the nearest adjacent space of the plates; the plates being attached to the elastic material, whereby the plates, by reason of their unconfined edges and the intervening elastic material, can each vibrate or move in any direction independently. The result sought to be covered by the two claims of the patent are of course the same.

In plain language, the object was simply to provide a joint between the glass plates which would permit the individual glass plates to vibrate or expand or contract without affecting or communicating such expansion or contraction to the adjacent plates.

It is a well known scientific fact that glass plates do expand and contract from the effect of heat or cold, and that they may be caused to vibrate by jars, shaking of the building, and from many causes, and that where the edges are attached in an absolutely rigid manner and where there is no room or space to protect the glass from this so-called movement caused by expansion or contraction or vibration, the plates do as a matter of fact so often break that it was found to be difficult to provide means which would prevent it, and it required many years of experimenting to discover means by which this expansion and contraction and vibration could be taken up without injury to the plates themselves, and the secret of the whole thing laid in the fact that each glass must be permitted to vibrate within itself without conveying that vibration to an adjacent plate. To do this some sort of a resilient or cushion joint had to be interposed between the edges of the adjacent plates. The patentee accomplished these results by the means described and claimed in his patent. These are facts not controverted by the defendants in this case.

### ERRORS RELIED UPON.

The assignment of errors is found on pages 123-124 of the transcript. There are four errors assigned, but for the purposes of this brief they may be condensed into two. The first error assigned is based



upon the holding of the Court, during the trial, that the appellant was not entitled to an injunction, when it appeared that the defendants, since the commencement of the suit, had ceased to make the infringing cases. The other three errors relate to the dismissal of the bill, presumably for want of equity and perhaps non-infringement.

We here wish to call the attention of the Court to the fact that the Court, in dismissing the bill rendered no opinion, (oral or otherwise) and in no manner indicated the grounds upon which the bill was dismissed. This order is found on pages "16" and "17," Tr. Consequently, appellant was unable to assign any particular ground wherein the Court erred, except in the form shown by the assignments of error. We do not know whether the bill was dismissed, because the Court held during the trial that complainant was not entitled to an injunction, where it appeared that the defendants had, subsequent to the commencement of the suit, ceased to make the infringing devices (Tr., bottom page "97"). If this was the ground upon which the Court dismissed the bill, it was clearly erroneous. It is a well established proposition that, the fact that the defendants have, either before or after the commencement of the suit, ceased to make the infringing devices is no defense, and no reason why an injunction should not issue, for the reason that where a party has once committed a tort of this kind he is likely to repeat it unless re-

strained by the Court. There are instances where it appears that the defendant had in good faith ceased to infringe the patent prior to the commencement of the suit, and the Court was satisfied beyond any doubt that it was not his intention to resume such infringement; the Court might, under such circumstances, be justified in denying the injunction. But, where the defendant (as in this case) claimed to have ceased to infringe the patent months after the commencement of the suit, it is no defense and no reason why an injunction should not issue. These questions have often been before the Court and we feel sure that the Court is familiar with the rule.

See:

*Walker on Patents, Sec. 701*, and cases cited,  
especially see:

127 Fed. Rep., p. 704, at page 708.

But, however this may be, there is no pretense that either of the defendants intend to cease using the infringing devices. The Webster Bros. are only charged with using, while Murray both made and used, and is still using, without any intention of ceasing to do so.

Nor, are we informed by any action of the Court whether he dismissed the bill because infringement of either of the claims had not been established. We will discuss this question of infringement after reviewing the testimony.

## ARGUMENT.

Inasmuch as it was conceded in open court, as before stated, that the only issue in this case to be tried was that of the infringement of the patent, it is only necessary now for us to discuss that subject.

It is true that the question of infringement is largely a question of fact, but in this case we claim that, especially upon the defendants' own testimony it becomes also a question of law as well:

*Cramer vs. Singer Manufacturing Co.*, 192  
U. S. at p. 444, 48 Law Ed., 264-266.

On page "22" of the transcript appears a colloquy between the Court and counsel, which developed the contention of the parties with relation to the questions to be litigated. It there appears that the defendants admitted that they used a structure comprising a plurality of glass plates, the edges of which are spaced from the adjacent plates, but the defendants contended that they had no felt cushion filling the space between the adjoining plates, nor that the plates were cemented to the felt. They denied also that each plate was adapted to freely vibrate in its natural plain of vibration, and that the plates were prevented by the felt cushion from imparting its vibration to the adjacent plates. The Court then read the second claim, and the defendants admitted that their structure comprised a plurality of glass plates, unconfined edge of one plate nearly, but not

quite, meeting another plate, also with unconfined adjacent edge. But, the defendants denied that they used an elastic material filling the space thus existing between the nearest adjacent edges of the plates, also that the plates were attached to the elastic material whereby the plates, by reason of their unconfined edges and the intervening elastic material, each could vibrate or move in any direction independently.

In order, therefore, to establish the infringement by the defendants of the first claim, it became incumbent upon the plaintiff to show that the defendants did use a felt cushion filling, and that the plates were cemented to this felt substantially in the manner and for the purposes described in the patent. In order to prove an infringement of the second claim it was incumbent upon the plaintiff to show that the defendants used an elastic material in the space between the nearest adjacent surfaces of the plates and that said plates were attached to this elastic material substantially in the manner and for the purposes described in the patent.

The plaintiff thereupon called as its first witness, Mr. Fred. Weber (the patentee), whose testimony commenced near the top of page "24," Tr. Mr. Weber testified quite fully upon the subject, the substance of which is:

That he had had large experience in the manufacture and sale of these show cases, had been in the business about eleven years, and that he thoroughly

understood the construction and mode of operation of the patented cases; he testified further that he had examined the defendants' cases at several points in Fresno, and it was not denied that the defendants had made the cases described. He stated, that the defendants' cases which he had examined were constructed by a joint between the different plates, a layer of felt in the joints, approximately  $1/16$ th of an inch thick with cement on both sides of the felt, cemented to the plates and holding them in position, and making the joint about an eighth of an inch thick; that the joints were elastic joints, that is: they would give or allow for contraction or expansion between the different plates. He also said: that a resilient joint, as he understood it, was simply a joint that will allow for expansion and contraction. He also stated: that he had done considerable experimenting in rigid joints and that he had found that the glass would generally break on account of not being allowed to vibrate or expand or contract, on account of the heat or cold, which they received. But, with certain elastic material between the joints to take up what little vibration there may be, or expansion or contraction, this trouble is avoided.

"THE COURT—What did you do to those that  
"you examined to determine whether they were  
"resilient or had vibration?"



To which the witness answered: "I put a knife blade through the joint and cut out some of the felt." He stated that there was no other way that he knew of to determine this question. The cement was plastic; it was soft enough for a knife blade to go through the joint; that the cement used by the defendants appeared to be the same as that used by himself. He also stated (on page "27," Tr.), that the top plate was removable in the manner described in the patent.

"THE COURT—This feature is one of considerable value, inasmuch as it permits of easy removal of plate when desired, as in altering the structure of the case, or in making repairs when one or more of the glass plates become broken."

We may here remark that it is not denied that in the defendants' structure this feature existed as a fact, and that the plates could be removed in the manner described in the patent.

The witness further testified that there was no means, outside of a knife blade or pin or something of that nature to insert in the joint by which it could be determined whether it was a plastic or resilient joint or not; that if the knife blade penetrated into the joint it would show that the material was soft and plastic and therefore made the resilient or elastic joint called for in the patent, and that it acted as a sort of a cushion in the joint, so that the possible vibration of a glass plate would be protected by its resilience

or softness of the material. The witness was here cross-examined at considerable length; the main purpose seeming to be to establish that the test of inserting a knife blade in the joints was not a safe test as to whether the joint was an elastic or resilient joint, such as described in the patent.

M. James P. Schafer was then called as a witness for the plaintiff. Mr. Schafer is President of the plaintiff corporation, and has been such for the past six years. He is manager of the Diamond Show Case Company, which is a licensee of the plaintiff. Mr. Schafer has had a very wide experience in this business and is probably more familiar with the subject than any other one individual.

On pages "51," "52" and "53," Tr., Mr. Schafer fully corroborated the statements of Mr. Weber, and then went more fully into the subject of his experience and knowledge of the method of testing out the different cases to determine whether the joints were elastic or resilient and an infringement of the patent.

On page "53," Tr., Mr. Schafer said that the defendants' cases were made with a plurality of glass plates, the plates being spaced from each other with an intervening space between, with a layer of felt and a layer of plastic cement between the intervening and adjacent plates. The Court then remarked that that seemed to make a prima facie case, and the witness passed on to other subjects.

He testified that it had been his duty, as an officer

of the plaintiff, to examine all glass cases throughout the United States and to pass upon the question as to whether they were made in accordance with this patent or not, and that he had been engaged in that business ever since 1907.

On page "54," Tr., the witness testified that, in investigating these cases, "the first principle which "would apply, when we can clearly see the felt, is "to penetrate the joint with a knife, or an instru- "ment similar, to see whether the joint is elastic "enough, soft enough in there to permit the instru- "ment going through it. We cannot take the top "off in a store. Sometimes when we have a case in "our factory we could jar it, probably shake it, and "by holding our hands on the edge of the plates we "could feel the vibration of the plate, but you can't "do that in a store, so the only real means left is for "you to penetrate the joint, and I examined here in "the matter of about a dozen different stores, and I "was able to penetrate the joints in every store in "some of the cases."

The witness further testified that the only way to determine the difference between a rigid joint and a resilient joint was to penetrate the joint with a knife blade. "In my experience I found that the resilient "joints, the elastic joints, can be penetrated with a "knife blade, and in the rigid joints, solid joints, I "was not able to do that."

He also testified, on page "55," Tr., that he had

been carrying on his experiments in testing these joints ever since the first time he made a trip through the United States, along in the latter part of 1906, when he started, and had been continuously doing it ever since, making a good many trips throughout the United States and in all cities where cases were manufactured; that he had visited large manufacturers and small manufacturers and saw what they were making and putting on the market, and that he had investigated to see whether they infringed the patent or whether they did not; that he issued licenses to manufacturers and took a general survey of all the manufacturers and what they were doing in all glass cases and other cases.

He further testified that said test was a safe and reliable one, and everyone with whom he came in contact (with any knowledge at all about the cases) followed that method.

He further testified, on page "56," Tr., that he found in the rigid joint cases that they would not permit expansion and contraction of the glass, or vibration of the glass in the show case, and heavy trucks going along the street and things like that, something bumped against it, people leaning against it, knocking it, or something like that, shaking it, the hauling of trucks and things, and that they will not stand the wear and tear the elastic joint cases will.

The witness was then cross-examined at great length upon this subject; the whole of which goes to more

clearly show the witness' knowledge of the subject and that the insertion of a knife blade or other similar instrument in the joint necessarily showed that the material was sufficiently plastic and soft to give when it was pressed by the edge of the glass, by reason of expansion or contraction or vibration from jars, etc. Years of practical experience in the testing of the joints of these show cases has taught those who have had that experience that you could not penetrate the joints with a knife blade, or other similar instrument, if the joints were rigid, and that you could always do so when they were not solid or rigid, and where the joints could be penetrated in that way they meet the calls of the patent and accomplished the ends sought.

In fact, there is probably no serious denial of any of these questions by the defendants.

We insist that the testimony of these two witnesses clearly made out our case and showed an infringement of both claims of the patent.

The Court itself, at the trial, seemed to be impressed with that idea.

We will now take up the defense. The defendants offered only two witnesses, namely:

MR. C. F. MURRAY, one of the defendants;

and

MR. SMART, an employee.



Mr. Murray is a very old gentleman, probably eighty years old, pretty hard of hearing, and did not seem to have any very clear conception of the questions involved. It was apparent that Mr. Smart could talk very glibly and could tell a great many things that he did not know, even better than he could tell things that he did know. It clearly appears from Murray's evidence, on pages "82" *et seq.*, Tr., that he did, in fact, use every element covered by the first claim of the patent; that is: he had a plurality of glass plates, the edges of which were spaced from the adjacent plates, a strip of felt filling the space between the adjoining plates, the plates cemented to the felt, each plate being adapted to freely vibrate in its natural plane of vibration. But, Mr. Murray took the ground that the cement which was used and placed on the edges of the glass with a putty knife would penetrate the felt between the top layers of cement, because of its thinness, and that after it formed and set the felt and cement so mixed as to be a conglomerate mass of felt and cement and that it made a rigid joint. He admitted making the cases testified to by the plaintiff's witnesses, but said that the joints were solid joints. Being asked the purpose he had in using little strips of felt, wood or anything else, in connection with those joints, he answered: "It ain't necessary at all. We can use heavier cement, leave everything out, the felt or anything else out. It is not necessary at all."

Being asked, what the felt would do when he made them in that way, he answered:

“If we put it on that way, it would simply keep it so the cement won’t be forced out, clear down, if we put in anything at all. In using that thin cement you had to put something in so it would not force the cement all out. We wanted some of it left there, sure. The only purpose in using felt or anything else in there, was because of the unevenness of the plane, and the cement was so thin that when it was put on alone it would ‘squash’ clear out, if it was not put in there; that was the only purpose of it. I never found any trouble with rigid joints; I never had any objection to them. I now use a more viscous or harder cement, and don’t use any other material than the cement itself. I never bought any cement of Mr. Schafer or Mr. Weber for that purpose. I don’t use theirs. We did make it ourselves for awhile. I never made an all-glass show case with the cushion or resilient joint.”

On cross-examination Murray testified, on page “84,” Tr., that he knew pretty near how the Weber case was made; that he made them with cement, just as he described in his application; he puts the cement on both sides of the felt and lays the felt between the plates. It makes a cushion joint; *“I mean by cushion joint that the cement don’t penetrate, don’t meet in the center, leaves fiber in there.”*

Being asked what was the effect of that on the glass plate, he said: “I don’t know; no particular effect at all; I don’t think.” Being asked, if there was any

difference in his mind between a rigid joint and a resilient joint, he said: "It don't amount to a snap of your fingers."

Being further asked, if (in his opinion) there was any difference in the effect or purpose of having a plastic, resilient joint, or a solid, rigid joint, he answered: "I can't see how it would make any difference."

"Q. Then the idea, according to your information, of putting felt in the cement at all is useless?

"A. Yes, I think so."

Let it be remembered that the witness had already testified that by the use of the felt, as described, a cushion joint was made, where the cement did not penetrate the felt, etc.

The witness then, on page "85," Tr., went on to describe how he had made the cases in the Webster Store as an illustration of how he had been making them up to several months subsequent to the commencement of this suit. He said: "We put on first "a layer of cement on the edge of the plate, piled up "in a cone shape, and then put on a layer of thin "felt on the top of this cone shaped cement and then "a layer of cement on the top of the felt, and then "pressed it down." He also stated that this cement "was a soft, plastic material, I think." Being asked, if the cement was soft and plastic, if it would not tend to make a cushion, he answered:

"A. No sir, you can't do it."

His contention being, that it made an absolute rigid joint. The whole contention of Mr. Murray being simply, that in his case the plastic cement penetrated the felt and made a rigid joint, while the plastic cement used in the case of the patented show case did not penetrate the felt and made a cushion joint. Of course, we contend that this is a mere attempt at evasion of the claims of the patent and should not be considered at all.

This testimony of Mr. Murray clearly shows that he did not have any very intelligent conception of the difference between a rigid and a soft plastic or cushion joint, nor the subject of the expansion and contraction of the glass plates. It is too late now in the art of glass show cases for anyone to undertake to contend that there is no difference between the resilient joint and a rigid joint, and that these glass plates, if the joints are solid and rigid, and have no other means provided to allow the plates to expand or contract from the effects of heat or cold, or to vibrate from jars, etc., are not proper joints to use, or that there is no difference between such joints and the elastic joints called for in the patent. The difference is well recognized by every intelligent manufacturer, and it is well known that rigid joint show cases have practically ceased to exist. It is significant, however, that some months after this suit was commenced, and before the trial, Mr. Murray had ceased for the time being to use felt and was making his joints out of

purely a plastic cement, thus avoiding the first claim of the patent, but infringing the second claim, which covers a resilient joint made from a plastic material alone.

The other witness called by the defendants was James A. Smart (his testimony commencing on the bottom of page "89," Tr.). It might as well be understood at the beginning of our comment on the testimony of this witness, that it appears from his own testimony (which was undoubtedly correct) that he had no knowledge of what the Murray people were doing, or how they made their cases prior to about two months before the trial of the case. He was a former resident of Los Angeles and came up to Fresno and became Manager of the defendant, The Murray Show Case Company, about July 1st, preceding the trial of the case. He had worked for the Weber Company in Los Angeles for some six years and was entirely familiar with the construction of the Weber Show Case. He proceeded to describe the method of constructing the Weber show case, and upon being asked by Mr. Gallaher, on page "91," Tr., to explain what the construction of the show case was, *then* being manufactured by the Murray Show Case Company, he answered:

"A. It makes a solid joint.

"Q. Well, explain how it is composed?

"A. Composed of cement. In fact, they were using a real thin felt until I came up here, and I told them not to use any felt at all, to use nothing



but cement, because a rigid joint of cement is just as good as felt would be.

"Q. Can you say whether or not in the manufacture of their (the defendants') cases the cement permeated the felt?

"A. Yes, sir, we endeavored to make a thin cement."

But, it will be remembered that Mr. Smart was not there and never saw the defendant Murray making any of the cases that he had made prior to the commencement of this suit.

The witness was then cross-examined and the character of his testimony clearly indicates that he did not know what he was testifying about, and that he was disposed to evade the truth.

The first question asked him (p. "92", Tr.), was:

"Q. What cases here in town do you know that the defendant Murray made?

"A. Made the cases for the Owl Drug Store. They are made with solid joints; made with cement, not felt in the joints. *I never saw the Murray Company make any cases before I came up here.* We put on the cement with a putty knife, on the upper edge of the plate. We put a piece of felt on the top of the cement, and on the top of that another layer of cement that penetrates it.

"Q. How do you know that it penetrates?

"A. Because I can take a putty knife and penetrate it. We tried it.

"THE COURT—I thought you said awhile ago you didn't put any felt in there. (Here is a plain prevarication.)

"A. I did, on these samples, yes, sir. I made these samples and we did, but we manufactured

it in Los Angeles. We can penetrate the felt with a putty knife.

"THE COURT—He is asking you what you did here.

"A. We use nothing but the cement now, since I have been here.

"Q. Since the suit was commenced you changed the program?

"A. Since I came up here. *I don't know anything about when the suit was commenced.* My testimony, so far as the manufacture of these show cases are concerned, only goes to that period of time, since July this year. I know nothing about what occurred prior to that time. I don't know how they were built, or what the effect was, whether solid or elastic joints."

This testimony leaves a question, as to how the defendant made the joints prior to the time when Smart arrived and induced Murray to make the changes mentioned, by the omission of the felt, entirely between the two witnesses for the plaintiff (Weber, the inventor, and Shaffer, the president of the company) on one side, and Mr. Murray on the other side. There is no dispute but that all the cases made by the defendant Murray prior to Smart's time were made by the use of felt in the joints. The only question is, as to whether the plaintiff's witnesses were correct in designating them as elastic joints as called for by the patent.

As already shown, Mr. Murray's testimony is entirely insufficient to overcome the testimony of experienced witnesses, such as we produced. The wit-

ness was then taken up again on re-direct examination and testified with relation to some models that he had made, which we cannot see are of any value.

On re-cross examination, page "95," Tr., the witness testified, that the way the defendant Murray made the cases *now was*, he did not use any felt at all.

"Q. What sort of cushion do you make?

"A. Thick cement.

"Q. Plastic?

"A. I don't know what the word means.

"Q. Soft?

"A. Yes, soft, pliable.

"Q. It gives, yields?

"A. Yes, sir.

"Q. Has that got any felt in it?

"A. No, sir.

"Q. No felt ground up and made in it?

"A. I didn't make it.

"Q. Do you know where you get it?

"A. Yes, sir.

"Q. You don't know how it is made?

"A. No, sir."

This testimony bears altogether upon the second claim of the patent and, if it is correct, it would show an infringement of that claim at this time.

At the bottom of page "97," Tr., the Court said: "That second claim comes up in the proposition. As near as I remember you said: they claim they are not doing it now. You couldn't have an injunction if you don't prove they are now doing it."

Here, we think the Court laid down a rule of law that is entirely untenable and incorrect. How far it

may have influenced his final Order dismissing the bill we are unable to say.

The witness here entered into some discussion as to the characteristics of the joints made by the cement alone, but when asked on page "99," Tr.:

"Q. How was it in the joint?

"A. I didn't test it in the joints.

"Q. Did you ever try to put your knife through one of these joints that you made, that you call solid?

"A. Yes, sir.

"Q. Can you do it?

"A. Yes, sir.

"Q. Then that material will give?

"A. Pushes the material out, the knife does. You can shove a knife through."

Here the witness gave some testimony in answer to questions by the Court, as to the condition of the joints in the Owl Drug Store cases. But this case was made long after the suit was commenced and is not in issue, nor was it put in issue by the plaintiff. At this point, the Court with counsel and the witnesses visited several of the places where show cases had been made and installed by the defendants prior to the commencement of the suit. The testimony is not particularly illuminating and only goes to show that, where the joints were made as testified to by the plaintiff's witnesses and by Mr. Murray also, that the knife blade could be readily introduced into the joints, and that they were such joints as described in the patent.

On page "116," Tr., Mr. Shaffer having been recalled for further examination, after the conclusion of the examination of the cases by the Court, testified in regard to the cement used in the Owl Drug Company cases. In that instance, it will be remembered, no felt was used.

Being shown the Court's Exhibit A, he was asked to look at it and state if he knew what it was.

"A. That is a piece of cement, removed from one of the joints of the Owl Drug Company's case.

"Q. Now is that, in your opinion, a yielding or resilient substance?

"A. Yes sir.

"Q. Which is termed in the second claim as an elastic material?

"A. Yes, sir.

"Q. Well, now tell how that operates, how it does, in fact, operate in the device.

"A. It acts as a cushion in the chain to prevent the shocks of the plates communicated from one to another, and to permit of expansion and contraction of the plates.

"MR. SCRIVNER—Now, as a matter of fact, can, if necessary, the plates constituting the top and the sides of the case, by reason of their unconfined edges, held apart by this stuff, the Court's Exhibit A, and the intervening plastic material you have been shown, in the middle. can these plates vibrate or move in any direction, independently? No difference how small or how great, can one move independently without transmitting its movement to the other plate?

"A. Yes, sir.

"Q. Upon what do you base that conclusion?

"A. I base it on the fact, one fact, that the



showcase will stand the ordinary use put to in stores, and the different climatic conditions it is subjected to, which make vibration or expansion or contraction, and the plate will expand or contract. It may be a very small part, and may need a very fine instrument to record the amount of movement there is in there.

"Q. Mr. Shaffer, I will ask you, whether there is any other reason that you know and can state to the court why this stuff you have got there makes an elastic joint?

"A. It makes an elastic joint for the reason that it is plastic.

"Q. In your opinion, does the words 'elastic material' mentioned in claim two contemplate that yielding or resilient substance other than felt, referred to in the second claim of the first page of the patent?

"A. Yes."

On page "118," Tr., Mr. Murray was recalled and testified that he had employed Smart about six months ago; that he had made some changes in making his devices since Smart came up; that since Smart came up he had made some cases as he had described in his previous testimony.

"Q. You have not ceased permanently to make them that way, have you?

"A. No.

"Q. And you make them both ways now?

"A. What do you mean by 'both ways'?

"Q. With felt and without felt.

"A. Yes.

"Q. Do you expect to continue to do so?

"A. Yes.

"Q. Now why have you ceased to make them

all with felt in the joints—some without felt in the joints? In other words, why do you make them without felt in the joints at all?

“A. Because I think it is the best way to make them.”

At the request of the Court, Mr. Smart was recalled for further examination.

“THE COURT—This substance in the show-cases at the Owl Drug Store, do you claim that will get hard?

“A. Yes, sir.

“Q. How long will it take to get hard?

“A. Well, where it is squeezed out to a thin layer, where the glass fits close enough together, as it should be, it will get hard in say about three months, two months—three months—all depends on the heat or the cold, of the weather. In cold weather I would say it would take longer. Where it is thick, for instance, where the cases come apart, the instance over there in particular, we cemented the cases one night and delivered them next morning. They were absolutely fresh, they were in a hurry for them, and we had to go over there and shove in some cement, without taking the cases apart, filled it in with a putty knife, to hold it until we got a chance to go down some night and do it at night. That is the condition of the case we saw.”

On cross-examination, page “121,” Tr., he was asked how long he had been actually making these cases, where nothing but the cement was used.

“A. I have only been making them practically since I came up here.

“Q. When was that?

“A. About two months ago, I should judge.

"Q. Is that hard and brittle?

"A. Some of them are.

"Q. Well, that one at the drug store?

"A. That one that we took the cement out of—no, because it is fresh.

"Q. How do you know how long it will take that particular case, for the joint to get hard and brittle?

"A. I can't say how long it would take that particular case.

"Q. Now name one particular case here in Fresno where the material has become absolutely hard and brittle?

"A. I don't know as there is any hard and brittle, absolutely, that I made.

"Q. Well, that is what we are talking about, what you made. You said those you made got hard and brittle.

"A. Yes, they do.

"Q. Well, where is one of them?

"A. They are not here. You asked me when I made them up here.

"Q. Yes, and I asked you where one was, where we could go and see it?

"A. You can see them down at Los Angeles.

"Q. None of them you have made up here in six months are hard and brittle?

"A. I have not been here six months.

"Q. Well, in three months?

"A. I have only made them 2 months.

"Q. They have not become hard and brittle yet?

"A. No, sir."

Now, the sum and substance of Mr. Smart's testimony is, that after he came up he advised Mr. Murray to cease inserting the felt in the joints and that he

mainly did so. That Smart, as a workman, made a number of cases without any felt in them, within about two months prior to the trial; that the joints in none of them, so made, had become hard and brittle. Consequently, there is no reliable evidence before the Court that any of the cases charged to have been made by the defendants, by Smart, had become hard and brittle. In fact, there is no reliable evidence that the joints in any of the cases made by defendant had become hard and brittle.

It seems that the two witnesses for the defendants did their best in an effort to evade the provisions of this patent and yet get all of its benefits. Probably they did not make as good cases, or as good reliable joints as the plaintiff makes, but they took all of the elements and features of the patent and combined them in exactly the same way and, undoubtedly, got the same results, or substantially the same results, and should be held as infringers of this patent.

It must be remembered that neither Murray or Smart ever tested any of these joints with a knife blade, or any other instrument, or at all. By actual experience they know nothing whatever of such tests, or what they would show. Neither of them knows whether the joints in the defendants' cases were solid or soft and elastic.

## INFRINGEMENT.

This patent has been before this Court several years ago, in the case entitled the "*Diamond Patent Company vs. S. E. Carr Company*," and is reported in 217 Fed. Rep., at page 400. In that case the only question submitted to the Court was as to the validity of the patent. It was claimed that it was anticipated and that was the only question of fact submitted. In this case the only question is one of infringement; the validity of the patent being conceded.

The character of the testimony for the defense does not materially differ from the ordinary stock testimony usually produced by defendants who are attempting to evade a patent and yet retain the substantial benefit thereof. The defendant will, no doubt, claim that there is some conflict in the testimony in regard to the question of the infringement and that, therefore, this Court will not interfere. We maintain, however, that there is no substantial conflict and we think that it will be apparent from reading the testimony of Mr. Murray himself. If, however, there is any slight conflict still that is not at all conclusive.

In the case of *Wilson & Willard Manufacturing Company vs. Bole* (227 Fed. Rep., page 610) this Court, in an opinion written by Judge Rudkin, said:

"The fact that the trial court decreed in favor of the appellees on conflicting testimony is entitled to consideration; but, if this court is convinced that



the decree is erroneous, after giving due weight and consideration to the superior advantages possessed by the trial court, a reversal must follow."

This is a well-known rule, and we do not think it worth while to cite other cases. This rule is particularly applicable to this case, provided it can be fairly said that there was any shadow of conflicting testimony in the record. As we have already shown in reviewing the testimony, the only evidence in the record on the part of the defense, as to what the defendant Murray did, prior to the commencement of the suit, was given by Mr. Murray, and while he concedes the use of all the elements of the first claim and in fact the elements of the second claim as well, he claims that the joints in the showcase were rigid instead of being elastic or resilient. He, however, gives no reason whatever for his conclusion that his joints were rigid. He does not pretend to ever have made any examination or test to determine that question. It is simply a bald statement that the joints are rigid, without the slightest testimony of any kind to support that statement, and we claim that such a statement cannot be held to conflict with the careful investigations made by plaintiff's witnesses and their intelligent statements and opinions based upon long experience in these matters.

As it has been well said in a number of decisions:

"The mere fact that there is an addition, or the mere fact that there is an omission, does not enable

you to take the substance of the plaintiff's patent. The question is not whether the addition is material or whether the omission is material, but whether what has been taken is the substance of the invention."

115 Fed., 504;

81 Fed., 395;

92 Fed., 653;

97 U. S., 120;

24 L. Ed., 935;

117 U. S., 689;

29 L. Ed., 1017.

We cannot see how the defendants can escape the charge of infringement of the first claim. They attempt to make it appear that they used a thin piece of felt, and that being thin rather than thick it necessarily absorbed the cement and thereby became a conglomerate mass, which he claims *of necessity* became solid. Smart admits in his testimony that he did not know anything about how the cases made by Murray before he came to Fresno were constructed, what the results were, or whether the joints were rigid or elastic. This clearly appears in Smart's cross-examination on page "121," Tr.

It must be remembered that the cases (often mentioned as The Owl Drug Store cases) were made long after this suit was commenced and after Smart came to Fresno, and it appears that the joints are not hard in those cases yet, but Mr. Smart gives it as his opin-

ion, that the joints in those cases will get hard in from two to three months, or more, owing to the weather. Of course, that is a mere speculation and of no value.

In his cross-examination on page "121" he said:

"I have only been making them practically since I came up here.

"Q. When was that?

"A. About two months ago, I should judge.

"Q. Is that hard and brittle?

"A. Some of them are.

"Q. Well, that one at the drug store?

"A. That one that we took the cement out of—no, because it is fresh.

"Q. How do you know how long it will take that particular case, for the joint to get hard and brittle?

"A. I can't say how long it would take that particular case.

"Q. Now name one particular case here in Fresno where the material has become absolutely hard and brittle?

"A. I don't know as there is any hard and brittle, absolutely, that I made.

"Q. Well, that is what we are talking about, what you made. You said those you made got hard and brittle.

"A. Yes, they do.

"Q. Well, where is one of them?

"A. They are not here. You asked me when I made them up here.

"Q. Yes, and I asked you where one was, where we could go and see it?

"A. You can see them down at Los Angeles.

"Q. None of them you have made up here in six months are hard and brittle?

"A. I have not been here six months.

"Q. Well, in three months?

"A. I have only made them 2 months.

"Q. They have not become hard and brittle yet?

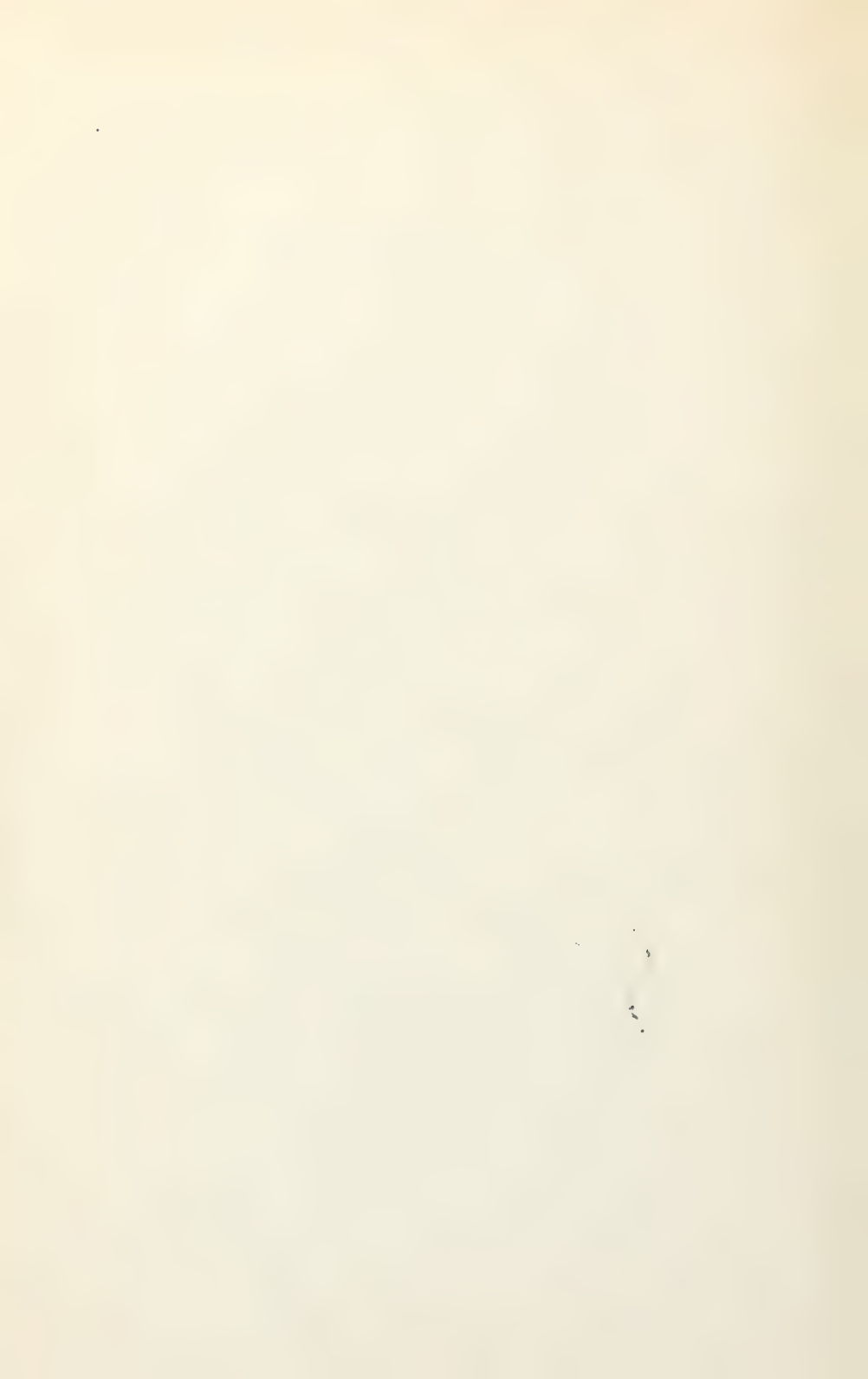
"A. No, sir."

As to the second claim, we contend that the testimony of Mr. Smart himself clearly shows that the joints, made with the cement used by the defendant, made an elastic joint. Our experimental tests showed that fact and our witnesses so stated and neither Smart nor Mr. Murray showed or testified that in any of those cases, made in that manner, the joints had become solid and rigid. Consequently, we urge that both claims are clearly shown to have been infringed, and that the decree entered dismissing the Bill is clearly erroneous, and we respectfully request the Court to reverse the decision of the Court below and order a decree in favor of the plaintiff.

All of which is respectfully submitted.

*J. J. Scrivener &  
Geo. H. Harpham*

Attorneys for Plaintiff.





NO.

2597

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IN THE  
United States Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

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DIAMOND PATENT COMPANY (a Corporation)  
Appellant,

vs.

WEBSTER BROS. (a Corporation) and C. F.  
MURRAY, et al,  
Appellees.

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DEFENDANTS' AND APPELLEES' BRIEF

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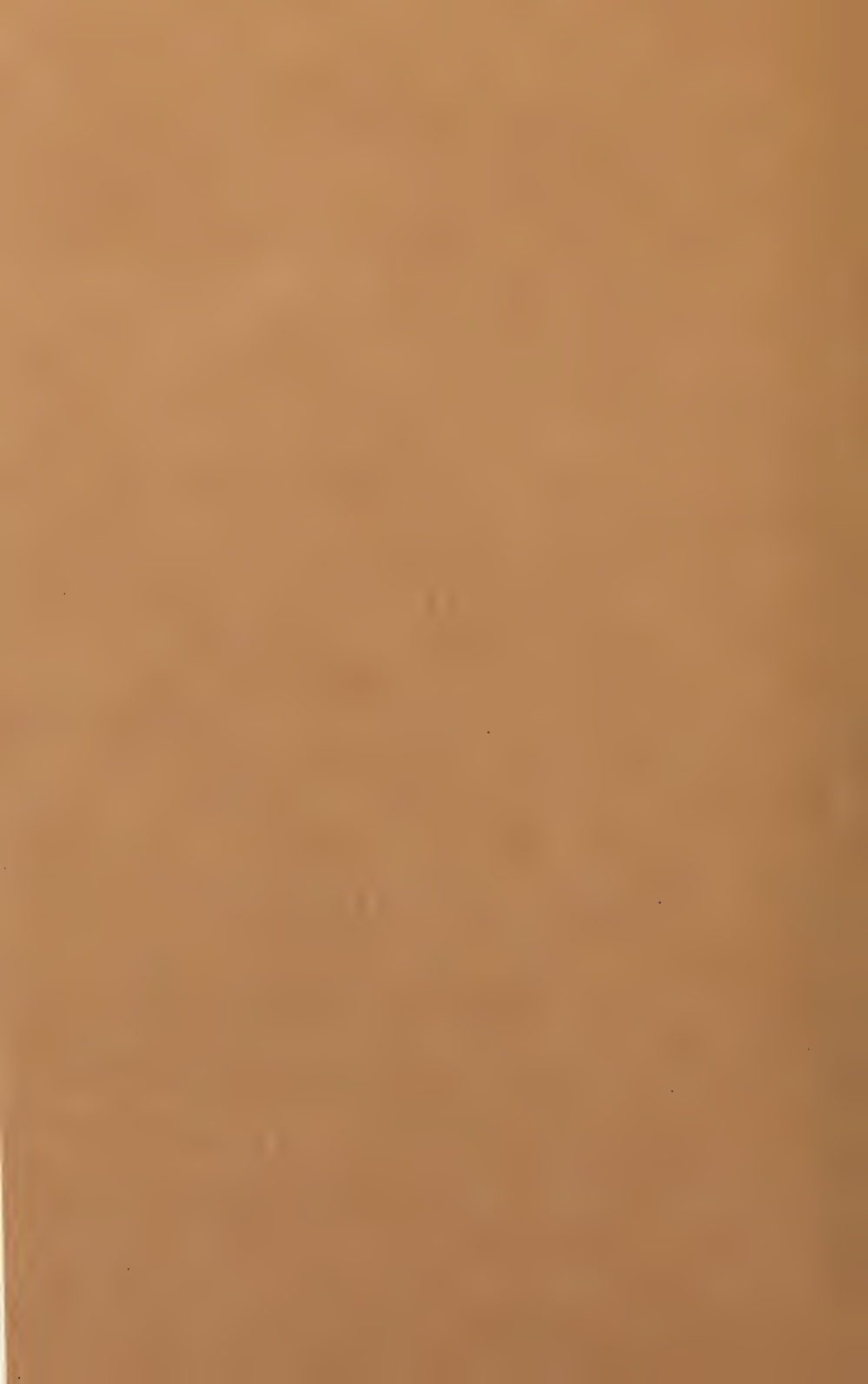
M. G. GALLAHER,  
Attorney for Defendants and Appellees.

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Filed

E. D. Manckton,



IN THE  
United States Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

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DIAMOND PATENT COMPANY,	Plaintiff,	A 55 Equity
vs.		
WEBSTER BROS., (a Corporation),	Defendant,	A 60 Equity Consolidated
DIAMOND PATENT COMPANY,	Plaintiff,	
vs.		
C. F. MURRAY, et al.,	Defendants.	

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DEFENDANTS' AND APPELLEES' BRIEF

This appeal is prosecuted by the plaintiff and appellant from the decision of the trial court in equity cases No. A-55 and A-60, the former being an action instituted by the plaintiff against the defendant in that case to enjoin the defendant in that case from the further use of certain show cases that the plaintiff alleged was being used in violation of the rights of the plaintiff as the owner of a patent upon all glass show cases, and the latter numbered case was an action for injunction against the defendant in that case to restrain and enjoin the defendant

in that case from the manufacture and sale of certain show cases that it was alleged were being manufactured and sold in violation of the rights of the plaintiff and appellant under the same patent, and in both cases the plaintiff and appellant prayed for an accounting by the defendants respectively.

The patent referred to was issued October 17th, 1905, to Fred Weber and appears attached between pages 16 and 17 of the transcript of the record on this appeal, to the provisions of which we call attention.

In the specifications it is set out from line 7 to line 11 that

“This invention relates to improvements in glass show cases; and the improvement resides particularly in the means for fastening one glass surface to another glass surface or to wood work forming a part of the case.”

And, at lines 24 to 35:

“Another object is to provide for a certain amount of elasticity at the joint, whereby a cushion effect is produced. If the parts were rigidly united, severe shocks received by the show-case would tend to shatter the plates or displace the parts; but in the present invention the cushion-joint aids in maintaining the union of the parts, affording as it does, an elastic or resilient joint, which eases the strain at the actual union or contact-faces of the plates, thereby also greatly softening the effects of shocks by the case.”

And, at lines 45 to 48:

“Figure 5 is a sectional view illustrating the method of fastening glass plates with an *intervening strip of molding.*”

Then at lines 48 to 56:

"The invention comprises in combination with the parts to be united such as glass or other material having a vitreous surface, a strip of *yielding material, such as felt*, which is interposed between the adjacent faces to be united. *Each face of the yielding material having a coating of cement*, which forms the union between the yielding material and the surface of the adjacent part."

And lines 57 to 81:

"Referring particularly to Fig. 2, 1 designates the front plate. 2 is the side plate and 3 is the top plate resting upon the front and side plates *with a strip of felt 4*, which lies upon the top edge of the side plates 1 and 2, both top and bottom faces of the *felt 4* having a cement 5, which unites the plate to the *felt*. The cement is applied to the felt superficially forming a skin, as it were, *on both sides of the felt, the body of the felt thus retaining its natural state. If the cement were applied to the felt so as to permeate the same, by uniting with the felt it would form a hard, practically homogeneous substance, thus destroying the resiliency of the felt. The cement should be applied to the felt when quite thick, so that it will not soak into the felt.* Thus a laminated structure is produced comprising the two layers of cement, *with an intervening layer of felt forming the yielding or resilient substance.* Any desired form of cement may be used for this purpose and yielding or resilient substances other than felt could be employed which selections are obviously embraced in the scope of my invention."

Again, at line 108 to line 5 on page 2 of the specifications:

"At the back of the case, where the glass plates fasten to the wooden structure 9, as shown in Fig. 1, *the same fasteninig means, consisting of*



*the laminated structure of felt and cement, is also employed with equally good results."*

And again, at page 2, at lines 11 to 14:

*"Parts which have been united in this manner cannot be separated without breaking the glass, except by running a sharp knife through the felt between the two layers of cement."*

Again, at page 2, lines 19 to 56:

*"The yielding nature of the felt cushion absorbs the sharpness of shocks on the case and obviates breakage which so frequently happens with all other forms of fastenings now known, particularly metallic corner-fastenings or structures in which a glass plate is grooved to receive the edge of another glass plate, which parts are united by cement at the groove, or show-cases in which the vertical glass plates are tightly fitted in grooved frames of wood or other material. In the latter structures severe shocks imparted directly to the front or side plates will fracture them, as a side plate has no interresiliency with the front plate or top frame; but the present invention avoids this difficulty, as there is inter-resiliency with both top and vertical plate which allows each plate to move relatively to the other, whether one plate alone is jarred or whether all plates are jarred simultaneously so that each plate vibrates its own degree and direction. The effect of this is particularly noticeable at the corners formed by the junction of three plates—the top plate, a side plate, and front plate—as at the corners referred to unless perfect cushioning of each plate is provided, a fracture is very likely to occur, resulting from the rigidity of the three-line joint and the unequal rate of vibration of*

*the respective three plates and the conflicting directions or planes of vibration centering at one point, and so far as I am aware, I am the*

first inventor to provide a structure comprising glass plates arranged in three different planes, each plate meeting and joining the other two with *an intervening cushion between the joining faces, to which cushion the glass plates are cemented.*"

The claims of the patentee are two, as appears at lines 59 to 78 of page 2 of the specifications, and are as follows:

"1. A structure comprising a plurality of glass plates, the edges of which are spaced from the adjacent plates a felt cushion filling the space between the adjoining plates, the plates being cemented to the felt, each plate being adapted to freely vibrate in its natural plane of vibration, *and prevented by the felt cushion from imparting its vibration to the adjacent plates.*"

"2. A structure comprising a plurality of glass plates, an unconfined edge of one plate nearly, but not quite meeting another plate also with unconfined adjacent edge, *an elastic material filling the space thus existing between the nearest adjacent surfaces of the plates*, said plates being attached to the *elastic material*, whereby the plates *by reason of their unconfined edges and the intervening elastic material* can each vibrate or move in any direction independently."

It will be seen from the foregoing claims and the specifications referred to that the essential thing under the patent is the cushion joint and the mechanical method of constructing that joint.

While there are two claims set forth by the patentee as above stated, it would seem quite clear from a reading

of those claims that the only thing additional to the first claim that appears in the second claim is that the cushion which is attached to the glass plates by means of cement need not necessarily be felt, but may be any other resilient material of sufficient tensile strength to hold the plates of the case together. It would appear from the argument of counsel on the trial of this case and also from their opening brief on this appeal that they contend that under the second claim their patent precludes the use of any material for the construction of the joints that may be, when the joint is constructed, in a viscous or plastic form or condition; but, plainly the material that the patentee had in mind according to all of his specifications and his first claim that would in fact be used to perfect his cushion joints was felt, and that it very naturally occurred to him that rubber or some other material might be so manufactured hereafter as to have at once the resilient quality and sufficient tensile strength to serve the purpose subserved by the felt, and therefore, he properly covered that contingency by his second claim, but did not cover either hard or plastic material, simply inserting in the place of felt cushion the following: “An *elastic* material, filling the space thus existing between the nearest adjacent surface of the plates and *said plates being attached to the elastic material.*” And while the claim does not itself say “being attached by cement,” of course, inasmuch as the cases are constructed without bolts or metallic fasteners and

inasmuch as all of the specifications referred to the attachment by cement, that claim would probably be the same as the first claim with the exception that the cushion may be of a resilient material other than felt, which resilient material forms one of the layers of the laminated structure which layer is attached to the glass by cement. No other construction, it seems to us, can be placed upon this claim when read together with the first claim and this construction is conclusively established by the patentee himself in his statement above quoted, "any desired form of *cement* may be used for this purpose and yielding or resilient substance other than felt could be employed, which selections are obviously embraced in the scope of my invention."

In the answer of the respective defendants it was not alleged that the patent claimed by the plaintiff was invalid but the defense set up and the issue upon which the cases were tried, was that the show cases used by the defendant Webster Bros., and manufactured by the defendant Murray, were not cushion or resilient joint cases but the joints were constricted with cement which in the all-cement joints was plastic when applied, and hardened thereafter and made a perfectly rigid joint, and that in some instances a very liquid cement had been used, and for the purpose of preventing the pressure from causing the cement to exude from the joint before it hardened, a narrow, thin strip of felt was imbedded in the liquid cement that was first applied to one of the

adjacent edges of the glass and then completely saturated with the liquid cement in such condition that the cement penetrated the felt and thus constituted one homogeneous mass which hardened into a perfectly rigid joint, and that the felt was not placed in laminated form and afforded no cushion or resiliency whatsoever.

This, it will be noted, was exactly the thing that the patentee gave notice to the world would not be an infringement of his patent, and would be a useless and worthless structure, as will be noted from line 67 to line 73 of page 1 of the specification:

*“If the cement were applied to the felt so as to permeate the same, by uniting with the felt it would form a hard, practically homogenous substance, THUS DESTROYING THE RESILIENCY OF THE FELT.”*

The defendants in these two cases, as the evidence shows, regarded the patent as valid, but did not infringe the patent, but on the contrary, made a show-case that the patentee himself would regard as valueless because of the certainty that it would from the effects of change in temperature, or other cause, break the glass, and as stated in appellant's opening brief, the defendant Murray, the manufacturer, testified that he would not give a snap of his finger for the difference between the rigid joint constructed by him, either wholly of cement or with cement and felt, the cement being applied so as to permeate the felt and make a homogeneous mass equally



as hard and unresilient as the all-cement joint, and the joint patented.

During the course of the trial the court by consent of counsel, inspected all of the show cases in question and therefore was fully informed from personal observation of the exact character and quality of the joints in the show cases in question and as to whether or not they were rigid joints or resilient or cushion joints, and of course finding that they were all rigid joints, could come to no other conclusion than that the show cases were not within the patent in question.

It should be stated here, that for convenience in calling the court's attention to the particular matters contained in the specifications and claims, the writer of this brief has in proper places either italicized or capitalized where that form does not appear in the matters quoted.

The validity of this patent has been declared by this court in the case of Diamond Patent Company vs. S. E. Carr Company, and the opinion of the court was reported at page 400 of 217 Federal Reporter. In that case the contention of the defendant was that the patent was invalid for the reason that all glass show cases had been manufactured and commonly used by the public before the patent was issued and therefore it is apparent that the plaintiff in that case, who is the plaintiff in the cases at bar, was obliged to overcome the proof of the defendant as to manufacture and use of like show-cases prior to the issuance of the patent.

This court in its opinion at page 403 of the Report, discussed the very question that was at issue before the trial court in this case and determined there, at page 404, that *the idea which is at the basis of the Weber invention is an elastic medium between the plates.*

Reviewing the evidence in the case, at page 403, the Court said:

“Whitcomb testified that the cases he made for the Cooper Drug Company and Federman had felt joints, and that he used felt in the joints of these all-glass cemented cases ‘for the vibration of the case,’ and that he made some without the felt, simply stuck one plate of glass on the other and found it was so solid any little jar would break it, and then he thought of the felt to give the elastic movement and make an elastic joint, and he testified that, while the joints in those cases are not hard and fixed, they appear to be solid but, he added, ‘there must be some give to them or they would break.’ ”

The court continuing: “But the evidence is not convincing that Whitcomb’s idea in using the felt was to furnish an elastic cushion between the plates. It seems, rather, to indicate that his idea was to insert a porous medium between the plates which, when it became saturated with glue, would present a more effective binding of the plates than could have been accomplished by glue or paste alone, and that the rubber strips which he employed in one or two instances must also have been used for the purpose of making a firmer joint, for it is common knowledge that such rubber soon becomes hard and loses its resiliency. He admitted that at first his glue permeated the felt, and he said:

‘And then I got a felt that we had treated waterproof. I can’t think what we called it. You can take any piece of cloth and have the pieces sort of waterproofed so as to keep your cement from soaking through.’

But there is absolutely no evidence that in any of the show-cases for the Cooper or Federman drug store was there any use of a waterproof felt. If, indeed, Whitcomb ever employed waterproof felt it must have been at some subsequent experiment.”

It would appear clear from the foregoing that the contention of the plaintiff in that case, who is the plaintiff in this case, was at that time that the very structure that he now claims to be an infringement of his patent was not an anticipation, for the reason that the joints constructed which it was claimed were anticipations, were rigid and not resilient, even though they contained felt that in its original form was a cushion but when permeated with the cement, as in that case and as in the cases at bar, became a rigid, homogeneous mass, making a non-resilient joint, and this court, of course, adopted that view.

Further continuing at page 403, the court said:

“Mr. Federmann, who was called as a witness for the appellee, testified: ‘There is no elasticity in the joints at all; none that I know of.’ It is true that he further testified that whatever elasticity followed from the use of the felt in the joints between the glass existed in those show-cases, and that any elasticity resulting from the method of construction existed in those cases. That was merely to state a truism. *Its effect was not to show that there was elasticity in the joints, and it does not detract from*

*the testimony of the witness that there was no elasticity in the joints. It may be conceded that, if there were any elasticity in joints in which the felt had been saturated by glue, Whitcomb secured it in the joints which he made, and which, as we have seen, were not satisfactory. To make such a joint was not to anticipate Weber's idea of using felt strips in combination with a plastic cement on each side thereof, which was of such quality as to hold, but not to penetrate the felt, and to leave it with all its natural elasticity as a cushion between the plates. It does not appear, therefore, that Whitcomb, in making his all-glass show-cases, had in mind the idea which is at the basis of the Weber invention, an elastic medium between the plates."*

Further, the court in the opinion calls attention to the witness Whitcomb's testimony, as follows:

"That they were put together with some kind of composition which seemed to be a very hard substance after it dried and 'it made a hard solid joint' and Jackson, who repaired two of them, testified that the joints were 'solid and rigid.'

The court also in the opinion calls attention to the testimony of the secretary of the appellant in that case in which he said:

"What I call solid joints all through because the material used (I would call it glue) *would permeate the felt and make a hard joint.* Whatever material he used *permeated the felt* \* \* \* \* and the material used in the construction of the Federmann cases which (whatever it is) *permeates the felt making a solid jointed case*, which was not the case in the patent. It was simply the process of putting these plates together with an *elastic joint*; that is the substance of the patent, as I understand it."

Further in the opinion, the court says:

“It does not prove that Whitcomb conceived the idea of an elastic joint, or that, if he conceived it, he gave to the public the benefit thereof.”

After further discussing the matter of the resilient joint, in this opinion, the court says:

“This result could not be obtained without the use of an *adhesive cement that would not penetrate the cushion and destroy its elasticity*, and the specifications plainly call for the use of such cement. The appellee’s contention that the patentee can claim nothing beyond the terms of his claim and that he must be limited to the invention covered thereby, is well founded.”

Again the italics are our own.

It will be seen by the foregoing that the very contention now made by the appellant in these cases was refuted and overcome in the case just cited and the court there held that the same cases that the appellant now claims are infringements upon his patent, were not anticipations thereof, and that the value of the patent and the basic principle of the patent was the resilient, or cushion, joint. Upon the question of fact as to whether or not the joints in the cases now in litigation were resilient, when the evidence is analyzed reduces itself to this simple proposition laid down by the appellant and its witnesses. If a knife blade will penetrate a joint on an all-glass show-case, that joint is resilient; if the joint on an all-glass show-case is resilient, a knife blade will pen-



etrate that joint. The proof, therefore, as is contended by appellant that a joint is resilient, is simply that it can be penetrated with a knife blade, and the fact that the joint can be penetrated by a knife blade, may be established by proof that the joint is resilient. Just what system of logic this reason is based upon is hard of comprehension. Chalk may be penetrated by a knife blade, but certainly no person would venture to say from that fact that chalk is resilient or when placed between weights produces a cushion effect.

It will be observed that counsel for appellant and the expert witnesses for the appellant do not distinguish between the words "elastic" and "plastic" and therefore, claim that if the cement when put in place to form a hard joint is plastic when placed there, forms an elastic or resilient or cushion joint. "Plastic" is defined as being "capable of being modeled or molded into various forms, as clay, plaster," while "elastic" is defined as "having the power or property of returning or springing to the form from which it has been bent, pressed or distorted, having the inherent property or quality or regaining its natural form or volume after the removal of any external force which has altered that form or volume; springy; rebounding."

It will thus be seen that plastic and elastic for the purposes of this patent are directly opposite terms. Plastic material will yield and after the yielding to force will remain in the form to which it yielded, while on

the other hand an elastic material will yield to force but after the force is released, will re-assume its original form. Of course "resilient" is practically synonymous with "elastic."

As stated above in this brief, in addition to hearing the evidence which is before this court in open court, the trial judge personally inspected the show-cases in question and after inspecting them and hearing the evidence determined that the joints in those show-cases are not so made that "a laminated structure is produced composing the two layers of cement with intervening layer of felt, forming the yielding or resilient substance," but it finds in the cases where any material other than cement was used in the joint that the cement had been "applied to the felt so as to permeate the same by uniting with the felt," and that it had formed "a hard, practically homogeneous substance, thus destroying the resiliency of the felt." (Lines 67 to 71, page 1 Specifications of Letters Patent; Transcript, p. 16.)

Having so found, of course, the trial court found as testified by the witnesses that the joints in question were hard, rigid joints and as this court has determined in the one case cited in this brief that the same structure of joints then relied upon as anticipations of the invention covered by the patent were not laminated joints and were not cushion joints or resilient joints or elastic joints, and that they were, therefore, not in any sense anticipations of the invention covered by the patent.

we submit that the finding of the trial court as to both the facts and the law of the case was correct.

It is respectfully submitted that the judgment of the trial court should be affirmed.

Respectfully submitted,

*M. G. Gallaher*

*Attorney for Appellees.*

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

CONSOLIDATED INTERSTATE - CALLAHAN  
MINING COMPANY, a Corporation,  
Plaintiff in Error,

vs.

BERTHA D. WITKOUSKI, et al.,  
Defendants in Error.

Transcript of the Record

Filed

MAY 19 1911

F. D. Monckton,  
Clerk.

*Upon Writ of Error from the United States District  
Court for the District of Idaho,  
Northern Division.*





No. ....

**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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CONSOLIDATED INTERSTATE - CALLAHAN  
MINING COMPANY, a Corporation,  
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**Transcript of the Record**

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*Upon Writ of Error from the United States District  
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*In the District Court of the United States for the  
District of Idaho, Northern Division.*

No. 657

BERTHA D. WITKOUSKI; and CHARLES F.  
WITKOUSKI and EUGENE D. WITKOUSKI,  
minors, by Bertha D. Witkouski, their Guardian  
Ad Litem, Plaintiffs,

vs.

CONSOLIDATED INTERSTATE - CALLAHAN  
MINING COMPANY, a Corporation,  
Defendant.

### COMPLAINT.

Come now the plaintiffs, and for cause of action  
against the defendant allege:

#### I.

That the above named plaintiffs are residents, citizens, and inhabitants of Shoshone County, State of Idaho, and residents of and within the judicial district and division of the above entitled Court.

#### II.

That Bertha D. Witkouski is the surviving widow of Charles Witkouski, and that prior to the death of the said Charles Witkouski, said plaintiff Bertha D. Witkouski and said Charles Witkouski were residing together as husband and wife in the County of Shoshone, State of Idaho.

#### III.

That said Charles F. Witkouski and Eugene D. Witkouski are the minor children of the plaintiff herein Bertha D. Witkouski, and the deceased,



Charles Witkouski, aged eight and five years respectively, and that prior to the institution of this suit, and on to-wit, the 11th day of July, A. D., 1916, the plaintiff Bertha D. Witkouski was appointed by the Probate Court of the County of Shoshone, State of Idaho, guardian ad litem of said minor children with authority to institute and prosecute this action as guardian ad litem of said minors, and this action is maintained by her for herself individually and as such guardian ad litem for and on behalf of her said children.

#### IV.

That the above named defendant is now and at all times hereinafter mentioned was a corporation organized and existing under and by virtue of the laws of the State of Arizona, and is now and at all of the times hereinafter mentioned was a citizen of the State of Arizona, authorized to and transacting business within the State of Idaho and doing business in the operation of a quartz producing mine in the Coeur d'Alene Mining District, County of Shoshone, State of Idaho, and within the judicial district and division herein designated.

#### V.

That the defendant herein does, and at all times hereinafter mentioned did and now does operate and control a certain zinc-lead mine in the County of Shoshone, State of Idaho; and at the time of the death of Charles Witkouski hereinafter referred to was engaged in the active development of said mine in and about said mine and said mining property.

## VI.

That on the 18th day of May, A. D. 1916, Charles Witkouski was employed by defendant as a "pusher," and at the time of the happening of the accident hereinafter complained of, was, with three other fellow workmen, employed in the work of development of said mine and said mining property.

## VII.

That the said mine in which said deceased was employed was operated by means of tunnels, stopes, shafts, and excavations constructed in the underground workings of said mine, consisting of a main tunnel, 6,000 feet approximately in length and branching off on the drift a distance of about 600 feet, to what is known as the "New Shaft" about 300 feet beyond the "Callahan Raise"; and at said point defendant had constructed and was using a vertical shaft extending from the tunnel level downward a distance of over 300 feet.

## VIII.

That for the purpose of transporting workmen and materials from the tunnel level downward through said shaft and to different portions thereof and to the bottom thereof, said defendant used, owned and operated a certain hoist slip or skip with necessary mechanical devices and attachments, consisting among others of an engine operated by compressed air together with wheels, bolts, pulleys, cables and drum, and from the drum of said hoist there extended a cable about 800 feet in length, to the end

of which cable was attached a metal bucket fastened thereto and said bucket was attached to the cross-head fitted with shoes that ran upon and against perpendicular guides extending from the top to the bottom of said shaft, and said bucket, by the operation of said engine and the revolving of said drum and the winding or unwinding of said cable was raised and lowered to the top or bottom of said shaft and to intermediate points therein; and that at the time of the happening of the matters hereinafter complained of, one Joe Egbert, was employed by defendant and working as hoistman, charged solely with the operation, management and control of said engine and said hoist and everything in connection therewith.

### IX.

That in the performance of the work required of deceased by defendant, it was his duty to work in said shaft hereinbefore referred to and in and about the workings thereof, and it was the duty and custom of deceased and the duty and custom of other employes of defendant in and about said shaft and the workings in connection therewith for a long time prior to the happening of the matters herein complained of, to go to and from their work by means of the bucket attached to the cable and operated by said engine, drum and cable as hereinbefore described, which bucket was raised and lowered as hereinbefore described, and that in pursuance of said custom and in accordance with the direction of said defendant, its agents, servants and employes, defendant entered

the mine of defendant on the 18th day of May, A. D., 1916, on the shift which regularly came to work at 11 o'clock P. M., and, together with three other employes of said defendant, got upon the bucket attached to said cable and said hoist as hereinbefore referred to and said bucket was by the hoistman in charge thereof attempted to be lowered into the shaft of said mine for the purpose of permitting said deceased and the other employes of defendant to reach the bottom of said shaft where they were to perform the duties required of them; that after said hoist had been started downward, suddenly and without warning, said cable and said bucket dropped downward a distance of approximately 150 feet at a violent, excessive and rapidly and suddenly increasing rate of speed, until deceased and the workmen who were upon said bucket, riding upon the same by standing upon the edge thereof and holding to the supports, rigging and cable thereof as was their custom, and the only place where they could ride or stand upon the same, a custom of which the defendant knew and in which it acquiesced, and which was the only way that said deceased and the other workmen could ride thereon,—said deceased and his coemployes became terror-stricken and frightened in the darkness that prevailed, the lights which they carried having been extinguished by the rapid and unreasonable rate of speed which said hoist had attained, and there being a general expression among them that the appliances had broken or given away, and the said deceased, terrified and frightened, on



account of the negligence and carelessness of defendant, its servants and agents, and on account of the confusion that had arisen by reason of said negligence and carelessness, reasonably concluding that there was greater danger to his life and safety in remaining upon said bucket and said hoist than in attempting to jump therefrom, and for the purpose of avoiding the imminent peril which was apparent by reason of the great and rapidly increasing rate of speed of said bucket, and by reason of the matters hereinbefore complained of, in the exercise of ordinary and reasonable care under all the circumstances then confronting him at the time and acting under intense excitement and upon the spur of the moment, thereupon jumped from said bucket and grabbed hold of some timbers on the side of said shaft, his hold upon said timbers being broken, and he fell to the bottom of said shaft, a distance of about 150 feet, inflicting injuries resulting in almost instant death.

#### X.

That in connection with the use and operation of said hoist or lift and as a part thereof, defendant used a drum around which the cable used in raising and lowering supplies and men was wound and unwound as the machinery was operated and on the outside of said drum and upon the end of said shaft was a mechanical contrivance known as a clutch, fastened to the shaft by means of four lugs, bolts, keys, or set screws, consisting of a band of metal or fibre, which was operated by means of a lever or brake, so that by pulling upon the brake or lever, the



clutch band was tightened, thus retarding and controlling the speed of the said hoist, and said brake and said lever were under the exclusive control and supervision of said hoistman.

## XI.

That said accident was caused and occasioned by and through the negligence of defendant in employing and keeping in its service the hoistman operating the engine hoist at the time of the happening of the matters herein alleged, and that said Egbert, the hoistman, was incompetent, inexperienced, nervous and excitable, and that defendant knew that said hoistman was not a fit and proper person to be intrusted with the operation and proper care of said hoist.

## XII.

That defendant, its agents, servants and employes were further guilty of negligence in the following particulars:

(a) In failing to furnish to deceased a reasonably safe place for the performance of the duties required of him.

(b) In failing to furnish to deceased proper, safe, suitable and adequate machinery, tools and appliances for the performance of the work required of him, in that, the bolts, lugs or keys by which the clutch was fastened to the shaft of the drum of said hoist were loose, worn out, unsafe and inadequate; that the brake band and clutch thereon, were worn out, loose, inadequate and unsafe, and that said clutch and the band thereof could

not be adjusted by said lever under the control of the hoistman so as to retard and control the speed of said hoist and prevent the same from attaining a dangerous rate of speed and from falling to the bottom of said shaft.

### XIII.

Plaintiffs further allege that at the time of the happening of the matters hereinbefore complained of there was in full force and effect in the State of Idaho an Act of the Legislature of said State, being Senate Bill No. 160, entitled "An Act Regulating the Operation and Equipment of Mines and Providing a Penalty for the Violation thereof", found at pages 266 to 271 of the Session Laws of the State of Idaho for the year 1909, passed at the Tenth Session of the Legislature of said State, and said defendant negligently, carelessly and unlawfully failed and neglected to comply with said law and negligently, carelessly and unlawfully violated the provisions of said law, as follows:

"Sec. 9. It shall be unlawful for any person to sink or operate a vertical or steeply inclined shaft to a greater depth than 250 feet without having the same equipped with a mine cage, skip or bucket fitted with safety clutches."

"Sec. 24. It is unlawful for any person, company or corporation to hoist or lower men at a greater speed than six hundred feet per minute;

\* \* \*"

and Section 15 of said Act, amended as Section 16 by Senate Bill No. 116, entitled "An Act to Amend Sec-

tion 10, Section 15 and Section 16 of Senate Bill No. 160, Session Laws of 1909, Page 266, being 'An Act Regulating the Operation and Equipment of Mines, and Providing a Penalty for the Violation thereof,' approved March 15, 1909," found at pages 133 to 134 of the Session Laws of the State of Idaho for the year 1915, passed at the Thirteenth Session of the Legislature of said State, as follows:

"Sec. 16. Every mining property using hoisting apparatus within the State of Idaho shall keep one copy of this entire code posted on the gallows frame, and a copy of the bell signals before the hoist engineer, and on each station. \* \* \*".

#### XIV.

That defendant negligently and unlawfully failed to comply with the law referred to in the preceding paragraph in the following particulars:

(a) That the shaft which defendant had sunk at the place where deceased met his death was a vertical shaft and extended to a depth of more than 250 feet, and that the same was not equipped with a mine cage, skip or bucket fitted with safety clutches, and that the bucket and hoist in connection with which deceased met his death was not in any manner equipped or fitted with safety clutches.

(b) That the men, including deceased, were being lowered into said shaft at a speed greater than 600 feet per minute of time.

(c) That a copy of said statute referred to was not posted as required by law on the gallows frame or at any other place in the vicinity of said working.

## XV.

Plaintiffs allege that the violation of said statute hereinbefore referred to was one of the causes of the death of deceased and that the deceased would not have been killed had defendant complied with the provisions of said statute, and that it was the duty of defendant to comply with the requirements of said law, and that said law was imposed for the benefit and protection of deceased, and was a duty which defendant owed to deceased for his safety from the injuries which resulted in his death.

## XVI.

That at the time of the happening of the matters herein complained of, and for some time prior thereto, it was the custom in mines operating generally in the district in which said accident occurred and for the defendant to promulgate, provide and enforce reasonable rules regulating the conduct and operation of hoists used for the purpose of transporting men and materials, and it was likewise the custom of said other mines in said district to adopt a rule or regulation requiring that the skip or hoist be raised and lowered before permitting the same to be used in transporting men and materials, and that had said hoist been raised and lowered before permitting deceased to ride thereon it could have been determined that said machinery was unsafe and out of repair, and defendant was guilty of negligence in failing to provide and enforce such reasonable rule and regulation.



## XVII.

That the death of said deceased was caused and occasioned wholly and exclusively by and through the negligence and carelessness of defendant, its servants and agents, and without fault or negligence on the part of said deceased.

## XVIII.

That said defendant, at the time of the happening of the matters herein complained of, and for some time prior thereto, had in its employ a master mechanic, whose duty it was, in accordance with the custom that prevailed in defendant's mining property, to inspect, care for and repair all defects found in said machinery and hoisting apparatus, and that it was no part of the duty of deceased to inspect or repair said hoist and deceased had nothing to do therewith, and that defendant was negligent in failing to properly inspect and repair said hoist and to place the same in a reasonably safe condition, and that had said master mechanic performed his said duty and had made an investigation of said hoisting apparatus, which it was his duty to do, the defective, unsafe and dangerous condition of said machinery and apparatus and appliances could and would have been discovered, and defendant knew of the dangerous, unsafe and defective condition of said machinery and appliances, or in the exercise of reasonable care could have ascertained such condition.

## XIX.

That the above named minors are the only surviving minor children of the deceased and that they,



together with Bertha D. Witkouski, are the only surviving heirs of said deceased.

XX.

That at the time of the happening of the death of said deceased he was thirty-seven years of age, strong, able-bodied, sound and robust mentally and physically, was industrious and devoted to his family and took great pains and care with their maintenance and education, and his family was dependent upon him for their support and maintenance.

That the said Charles Witkouski was earning and capable of earning at the time of his death and for a long time prior thereto upwards of \$6.00 per day. That had he lived, it was his intention to care and provide for his said family and to give the said minor children the benefit of an education. That they have been deprived of his love, comfort, advice, and counsel, and of his earnings and accumulations, and that by reason of all the matters and things herein set forth and of the acts of negligence of the defendant, the plaintiffs have sustained damages in the sum of FORTY THOUSAND DOLLARS (\$40,000.00).

WHEREFORE plaintiffs pray judgment against the said defendant in the sum of \$40,000.00, and for their costs and disbursements herein.

PLUMMER & LAVIN,  
Spokane, Wash.

THERRETT TOWLES,  
Wallace, Idaho,  
*Attorneys for Plaintiffs.*

State of Idaho,  
County of Shoshone,—ss.

BERTHA D. WITKOUSKI, being first duly sworn, deposes and says:

That she is one of the plaintiffs in the above entitled action; that she has read the foregoing complaint and knows the contents thereof, and believes the facts therein stated to be true.

BERTHA D. WITKOUSKI.

Subscribed and sworn to before me at Wallace, Shoshone County, Idaho, this 11th day of July, A. D. 1916.

(Seal) THERRETT TOWLES,  
Notary Public in and for the State of Idaho, residing at Wallace, Idaho.

Filed, July 13, 1916.

W. D. McReynolds, Clerk.

By L. M. Larson, Deputy Clerk.

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(Title of Court and Cause.)

No. 657.

### DEMURRER TO COMPLAINT.

Comes now the defendant in the above-entitled action and demurs to plaintiffs' complaint therein, and for grounds of demurrer thereto alleges that the said complaint does not state facts sufficient to constitute a cause of action.

JAMES A. WAYNE,  
Attorney for Defendant, residence and post-office address Wallace, Idaho.

(Service acknowledged.)

Filed, Aug. 7, 1916.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 657.

ANSWER.

Comes now the defendant above named and for answer to Plaintiffs' Complaint herein, admits, denies, qualifies and alleges as follows:

I.

Admits the allegations contained in paragraphs I, II, III, IV and V of said Complaint.

II.

Defendant admits that on the 18th day of May, 1916, Charles Witkouski was employed by defendant as foreman of a shaft crew in the Interstate Mine and admits that the foreman of a shaft crew is sometimes called a "pusher"; defendant denies that the said Witkouski at the time of his accident was with three other fellow workmen and alleges that in truth and in fact the said Witkouski was the foreman of a shaft crew consisting of himself and several other men.

III.

Defendant admits the allegations contained in paragraph VII of said Complaint, except that it denies that the shaft in which the said Witkouski was working at the time of his accident was over three hundred feet in depth.

IV.

Defendant admits the allegations of paragraph VIII of said Complaint, but in this connection alleges that the Joe Egbert mentioned in said paragraph

was the hoist engineer in the crew of the said Witkouski and was working under the immediate supervision and direction of the said Witkouski at the time of the latter's accident.

## V.

Answering paragraph IX defendant admits that it is customary for its employees to go to and from their work in the bucket attached to the cable described in said complaint, but denies that this defendant, or any of its agents, servants, or employees, ever directed any employees of the defendant to go to and from their work by that means, or in that manner; defendant admits that on the night of May 18th, 1916, Witkouski got upon said bucket with three other employees of defendant and that the hoist man working under the direction and supervision of said Witkouski attempted to lower said bucket into the mine; defendant admits that after said hoist had been started downward it dropped rapidly for some distance, but denies that it suddenly and without warning dropped downward a distance of one hundred and fifty feet, or any distance whatsoever in excess of sixty feet; denies that said bucket, or hoist, dropped downward at a violent, excessive, or rapid, or suddenly increased rate of speed until the deceased and the workmen upon said bucket, or any of them riding upon the same were terror stricken or frightened, and denies that this defendant had ever acquiesced in any custom which permitted its employees to ride upon said bucket in the manner described in paragraph IX of said complaint; denies



that said hoist descended at an unreasonable rate of speed and denies that there was a general expression among said employees that any appliances had broken or given away; denies that the said deceased became terrified, or frightened on account of the negligence, or the carelessness of the defendant or its servants, or agents, and denies that there was any negligence or carelessness on the part of the defendant, or on the part of any of its agents, or servants, excepting on the part of the said Witkouski; denies that on account of the confusion that had arisen by reason of any negligence, or carelessness, that the said Witkouski reasonably concluded, or concluded at all that there was greater danger to his life or safety in remaining upon said bucket and said hoist than in attempting to jump therefrom and denies that there was any danger attendant upon remaining in said hoist whatsoever; denies that for the purpose of avoiding the imminent peril by reason of the great, or rapidly increasing rate of speed of said bucket, or by reason of any matters or things set up in said complaint, the said Witkouski in the exercise of ordinary, or reasonable care under all the circumstances then confronting him, or under intense excitement, or upon the spur of the moment, jumped from said bucket, or grabbed hold of any timbers on the side of said shaft; defendant admits that while the said Witkouski and three other employees were descending said shaft in said bucket, the speed of said bucket was slightly increased for a distance of approximately sixty feet and that the said Witkouski carelessly



and negligently and without any regard for his safety and for reasons unknown to this defendant, jumped from said bucket and fell to the bottom of said shaft sustaining injuries which resulted in his death; and further answering said paragraph IX this defendant alleges that the said bucket was stopped after having descended approximately 60 feet from the place where the speed thereof had first been increased; and that the three men who were in the said bucket were uninjured and that said Witkowski was injured solely and entirely by reason of his own carelessness and negligence in jumping from said bucket.

## VI.

Defendant admits the allegations contained in paragraph X of said complaint, except that it denies that the operation of said hoist, or the said brake, or clutch, or lever were under the exclusive control or supervision of said hoist man and alleges that in truth and in fact the said hoist was under the general supervision and control of the foreman of the shaft crew and that at the time said Witkowski met his death, the said hoist apparatus, including the said brake, lever and clutch were subject to the general supervision of said Witkowski.

## VII.

Defendant denies that said accident was caused or occasioned by, or through the negligence of defendant in employing or keeping in its service the hoist man operating the engine hoist at the time of the happening of said accident and denies that said hoist man was incompetent, or inexperienced, or ner-

vous, or excitable, and denies that defendant knew that said hoistman was not a fit and proper person to be intrusted with the operation and proper care of said hoist, and denies that said hoist man was an improper or unfit person to be entrusted with the operation and care of said hoist.

### VIII.

Defendant denies that this defendant, or its agents, or its servants, or employees, save and except the said Witkouski were guilty of negligence in failing to furnish the deceased a reasonably safe place for the performance of the duties required of him, and denies that defendant did fail to furnish the deceased with a reasonably safe place in which to work; defendant denies that it failed to furnish to deceased proper or safe, or suitable, or adequate machinery, or tools, or appliances for the performance of the work required of him, and denies that the bolts, lugs, or keys by which the clutch was fastened to the shaft of the drum of said hoist were loose, or worn out, or unsafe, or inadequate and alleges that if the said bolts, lugs, or keys were in fact loose, worn out, unsafe, or inadequate, it was the duty of the said Witkouski to cause the said defects to be remedied, or reported to the said defendant, and defendant denies that the brake band, or clutch on said drum were worn out, or unsafe, or that said clutch, or said band could not be adjusted by said lever by the hoist man so as to retard or control the speed of said hoist and prevent the same from continuing at a dangerous rate of speed or from falling to the bottom of the shaft.

IX.

Defendant admits the existence of the laws of the State of Idaho, found at pages 266 to 271 of the Session Laws of the State of Idaho for the year 1909, but denies that defendant negligently, or carelessly, or unlawfully, or in any manner failed or neglected to comply with said law or negligently, or carelessly, or unlawfully, or in any manner violated any of the provisions of said law.

Defendant admits the existence of the laws of the State of Idaho found at pages 133 to 134 of the Session Laws of the State of Idaho for the year 1915, but denies that defendant negligently, or carelessly, or unlawfully failed, or neglected to comply with said law, or negligently, or carelessly, or unlawfully did in any manner violate any of the provisions of said law.

X.

Defendant denies that it negligently, or unlawfully, or in any manner failed to comply with said law, or any laws of said State of Idaho.

XI.

Answering paragraph XIV of said complaint this defendant denies that it negligently or unlawfully, or in any manner whatsoever failed to comply with the law or laws referred to in paragraph XIII of said complaint; admits that the shaft in which the said Witkouski was descending at the time of his death was a vertical shaft more than 250 feet in depth, to-wit, of about the depth of 300 feet, but de-

denies that said shaft was not equipped with a mine cage, or skip, or bucket fitted with safety clutch; denies that the bucket and hoist mentioned in said complaint was not equipped or fitted with safety clutches and alleges that in truth and in fact the said bucket was equipped with safety clutches; denies that the said Witkouski and the men in the bucket with him were being lowered at a speed greater than six hundred (600) feet per minute, and alleges that in truth and in fact the said bucket was being lowered at a rate of speed much less than six hundred feet per minute.

Further answering paragraphs XIII and XIV of said complaint, the defendant alleges that all of the laws referred to in said paragraphs, to-wit, Senate Bill No. 160 found at pages 266 to 271 inclusive of the Session Laws of the State of Idaho for the year 1909, constitutes and is a penal statute and that any violation thereof is made a misdemeanor under the terms of said act, subjecting the guilty party to fine or imprisonment, or both such fine and imprisonment and no other penalty or punishment whatsoever.

## XII.

Answering paragraph XV of said complaint, defendant denies that the alleged violation of said statute referred to in said complaint was one of the causes of the death of deceased and denies that deceased would not have been killed had defendant complied with the provisions of said statute, and denies that defendant did not comply with the provisions of said statute; defendant denies that



it was the duty of defendant to comply with the requirements of said statute and alleges that if the defendant did not comply with the requirements of said statute that its default, or defaults in this respect were well known to the said Witkowski and that the latter continued to work in the service of the defendant with full knowledge of said facts; defendant denies that said law was passed for the benefit or protection of the deceased, and denies that it was a duty which defendant owed to deceased for safety from injuries which resulted in his death.

### XIII.

Defendant admits that it was the custom in mines operating generally in the Coeur d'Alene District to promulgate, provide and enforce reasonable rules regulating the conduct and operation of hoists used for the purpose of transporting men and materials, and alleges that in truth and in fact this defendant had promulgated, provided and attempted to enforce such reasonable rules at the time said Witkowski met his death; admits that it was customary to require that the skip, or hoist be raised or lowered before permitting the same to be used in transporting men and materials and alleges that it was the duty of the foreman of the hoist crew to enforce such regulation and that it was the duty of the said Witkowski, as foreman of the hoist crew, on the night of the said accident to cause said skip to be raised and lowered before ordering his men therein and before going therein himself; defendant denies that by the raising



or lowering of said skip, or hoist, it could have been determined that said machinery was unsafe, or out of repair and denies that said machinery was unsafe or out of repair; denies that defendant permitted the said Witkouski to ride upon said skip and denies that defendant was guilty of negligence in the failure to provide or enforce such reasonable rule or regulation, or any reasonable rule or regulation whatsoever.

#### XIV.

Defendant denies that the death of the said Witkouski was caused, or occasioned wholly or exclusively by or through the negligence or carelessness of the defendant, or its agents, or its servants, or without fault or negligence on the part of the said Witkouski and alleges that in truth and in fact the death of the said Witkouski was caused or occasioned wholly and entirely by reason of his own negligence and carelessness.

#### XV.

Defendant denies that it was the duty of its master mechanic to inspect said machinery or hoist apparatus and denies that it was no part of the duty of the said Witkouski to inspect said hoist and alleges that in truth and in fact it was the duty of the said Witkouski, as foreman of said hoist crew, to inspect said hoist and hoisting machinery and if he found any defects therein to refer the same to said master mechanic in order that said defects be remedied and said repairs be made; defendant denies that the said

Witkouski had nothing to do with the inspection of said hoist and hoisting machinery; denies that defendant was negligent in failing to properly inspect or repair said hoist, save and except that defendant alleges that said Witkouski, whose duty it was to inspect said hoist and hoisting machinery on the night of his said accident, carelessly and negligently failed to inspect the same and denies that defendant was negligent in failing to place said hoist in a reasonably safe condition and alleges that in truth and in fact the said hoist was in a reasonably safe condition; denies that had said master mechanic performed his said duty, or made an investigation of said hoist apparatus, the defective or unsafe, or dangerous condition of said machinery, or apparatus, or appliances could, or would have been discovered and denies that it was the duty of said master mechanic to make said inspection; defendant denies that it knew of the dangerous, unsafe, or defective condition of said machinery or appliances, or in the exercise of reasonable care could have ascertained such condition and denies that such machinery or appliances were dangerous, or unsafe or in a defective condition.

## XVI.

Defendant denies that at the time of the death of the said Charles Witkouski, or for a long time prior thereto, or at any time, the said Witkouski was earning, or capable of earning upwards of \$6.00 per day, or any sum in excess of \$5.00 per day; defendant denies that by the death of the said Witkouski, or by

any acts of negligence of the defendant the plaintiffs have sustained damages in the sum of Forty Thousand (\$40,000.00) Dollars, or in any sum or sums whatsoever.

#### XVII.

Further answering said complaint and as a first affirmative defense thereto, this defendant alleges that the injuries suffered by the said Witkouski and his death as a result of said injuries, were brought about and occasioned solely and entirely because of the carelessness and negligence of said plaintiff in not using due care and caution in respect to his work and particularly with reference to the inspection of said hoist and hoisting machinery and his failure to inspect the same before causing the same to be used and by reason of his carelessness and negligence in jumping from said skip, cage, or hoist, while the same was in motion.

#### XVIII.

Further answering said complaint and as a second affirmative defense thereto, this defendant alleges that plaintiff was at the time of his accident and death an adult person, in the full possession of all his mental faculties and of large experience in and about mines; that in entering into the employ of the defendant it was part of the consideration for such employment, and the plaintiff agreed thereto, that all risks, dangers and damages which were or might be sustained by said plaintiff in pursuing such employment as he was engaged in at the time of his

injury and death as alleged in said complaint were assumed by said plaintiff and that for such injury, risk or danger neither the defendant nor any one for whom it was responsible, should be liable in any degree or to any extent therefor whatsoever.

XIX.

Furthering answering said complaint and as a third affirmative defense thereto, this defendant alleges that said Witkouski at the time of his death assumed the risk attendant upon the use of said hoist before accepting the same and also assumed the risk of jumping from said hoist as it descended in said shaft while the hoist or skip, or cage was in motion.

XX.

WHEREFORE defendant prays judgment that plaintiff take nothing by his said action, that said action be dismissed and that defendant recover its costs and disbursements herein.

JAMES A. WAYNE,

Attorney for Defendant, Residence and Post Office  
address, Wallace, Idaho.

State of Idaho,

County of Shoshone,—ss.

C. W. Newton being first duly sworn on his oath deposes and says that he is the designated agent and the Manager of the defendant corporation and makes this verification for and in behalf of said defendant; that he has read the foregoing Answer and knows the contents thereof and believes the facts therein stated to be true.

C. W. NEWTON.



Subscribed and sworn to before me this 21st day  
of October, A. D. 1916.

(N. P. Seal)     ALBERT H. FEATHERSTONE,  
Notary Public in and for the State of Idaho, residing  
at Wallace, Idaho.

(Service acknowledged.)

Filed Nov. 3, 1916.

W. D. McReynolds, Clerk.

By Pearl E. Zanger, Deputy.

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(Title of Court and Cause.)

No. 657.

VERDICT.

We, the jury in the above entitled cause, find for  
the plaintiffs and assess their damages against the  
defendant in the sum of \$15,000.00, Fifteen Thous-  
and.

ARCHIE A. GOLLEN,

Foreman.

Filed Nov. 25, 1916.

W. D. McReynolds, Clerk.

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(Title of Court and Cause.)

No. 657.

JUDGMENT ON VERDICT.

This action came regularly on for trial in open  
court on the 24th day of November, A. D. 1916, be-  
fore the court and a jury of twelve good and lawful  
men drawn and selected from the Northern Division  
of this District to try said cause. Messrs. Plummer  
& Lavin and Therrett Towles, Esq., appearing as



attorneys for plaintiffs and James A. Wayne, Esq., appearing as attorney for defendant; whereupon witnesses were sworn and testified and documentary evidence introduced on behalf of defendant, and, after the introduction of all of the evidence as aforesaid, the cause was argued by respective counsel, and after argument of said counsel the court instructed the jury, thereupon the jury retired to consider of their verdict and subsequently, to-wit, on the 25th day of November, A. D. 1916, returned into court and announced that they had arrived at and returned their verdict, which said verdict was duly filed and is in words and figures following, to-wit:

*"In the District Court of the United States for the  
District of Idaho, Northern Division.*

Bertha D. Witkouski, in her own behalf and as  
Guardian ad Litem of the persons and interests of Charles Witkouski and Eugene Witkouski, minors,  
*Plaintiffs,*

vs.

Consolidated Interstate-Callahan Mining Company, a corporation,  
*Defendant.*

No. 657.

### VERDICT.

We, the jury in the above entitled cause, find for the plaintiffs and assess their damages against the defendant in the sum of \$15,000.00, Fifteen Thousand.

ARCHIE A. GOLLEN,  
Foreman."

And thereupon said jury was duly polled, and each of said jurors was asked if said verdict of Fifteen Thousand (\$15,000.00) Dollars was his verdict, and each and all of them replied that it was.

NOW, THEREFORE, by reason of the law and the premises and the verdict aforesaid, it is hereby ORDERED, ADJUDGED AND DECREED that Bertha D. Witkouski, in her own behalf, and as Guardian ad Litem of the persons and interests of Charles Witkouski and Eugene Witkouski, minors, the above named plaintiffs, do have and recover of and from the Consolidated Interstate-Callahan Mining Company, a corporation, the above named defendant, the sum of Fifteen Thousand (\$15,000.00) Dollars, together with plaintiffs' costs and disbursements necessarily incurred herein and taxed in the further sum of Two Hundred Nine and 35/100 (\$209.35) Dollars, which said sums are to bear interest at the rate of seven per cent per annum from the date hereof, and judgment is hereby entered on the verdict aforesaid.

Dated November 25th, 1916.

W. D. McREYNOLDS, Clerk.

Filed November 25, 1916.

W. D. McReynolds, Clerk.

By Pearl E. Zanger, Deputy.

JOURNAL ENTRY (Record of Trial).

At a stated term of the District Court of the United States for the District of Idaho, held at Coeur d'Alene, Idaho, on Friday the 24th day of November, 1916.

Present: Hon. Frank S. Dietrich, Judge.  
Bertha D. Witkouski, et al.,

vs.

Consolidated Interstate-Cal-  
lahan Mining Company.

Civil No. 657.

This cause came regularly on for trial before the court and a jury, Messrs. Plummer & Lavin and Therrett Towles appearing as counsel for the plaintiffs, and James A. Wayne, Esq., appearing for the defendant. The clerk under direction of the court proceeded to draw from the jury box the names of twelve persons, one at a time, written on separate slips of paper and folded, to serve as a jury in this trial; Newton Arment, whose name was drawn from the jury box, who was sworn on voir dire, examined and passed for cause, was excused by the court upon the plaintiffs' peremptory challenge; Nick LaFrance, Charles F. Evans and Herman Lawson, whose names were drawn from the jury box, who were sworn on voir dire, examined and passed for cause, were excused by the court upon the defendant's peremptory challenge. Following are the names of the persons whose names were drawn from the jury box, who were sworn on voir dire, examined and accepted by counsel for both the plaintiffs and defendant, and who

were sworn by the clerk to well and truly try said cause and a true verdict render therein, to-wit: Malcom Bruce, Hugh Ross, Dennis Blake, D. W. Fredenburg, A. A. Gallon, William McLachlin, Carl Klockman, Peter Dillinger, L. A. Brainard, J. J. Hurm, C. F. Rudolph and John Amblie.

After a statement of plaintiffs' case to the jury by her counsel, Edward P. Moran, Herbert Erickson, Joe Egbert, Al Ringquist, Jonas Jacobson, J. H. Litton, Tom Hare, G. O. Gileace and Bertha D. Witkouski were sworn and examined as witnesses on the part of the plaintiffs, and here the plaintiffs rest.

The defendant's counsel expressing a desire to make a motion without the presence of the jury, the court after admonishing the jury excused them and they retired from the court room. The defendant now moves the court for a dismissal of the cause upon non-suit, which motion was argued before the court by counsel for the respective parties, after which the court announced its decision and denied the motion.

After a statement of the defense by defendant's counsel, Herman Gregory, Norman McDonald, Charles Meade, G. C. Carr, Ray Deline, and Edward E. Hughes were sworn and examined, and Joe Egbert was recalled and examined as witnesses on the part of the defendant.

Whereupon the court after admonishing the jury, excused them until 9:30 A. M. November 25th, 1916, continuing further trial herein until that time.



Saturday, November 25, 1916.

Bertha D. Witkouski, et al.,

vs.

Consolidated Interstate-Cal-  
lahan Mining Company

Civil No. 657.

This cause came regularly on for further trial before the court and jury, counsel for both the plaintiffs and defendant being present, the jury was called by the clerk and all found present. Whereupon Norman McDonald was recalled and further examined as a witness and documentary evidence was introduced on the part of the defendant, and here the defendant rests.

On rebuttal Edward P. Moran was recalled and further examined as a witness on the part of the plaintiffs and here both sides close.

The defendant here moves the court to instruct the jury to return a verdict in favor of the defendant, which motion was denied by the court.

The court thereupon delivered its instructions to the jury, after which they retired to consider of their verdict, having been placed in charge of A. L. Branch, a bailiff duly sworn.

On the same day the jury returned into court, and upon being asked if they had agreed upon a verdict, they, through their foreman, replied that they had and thereupon presented to the court their written verdict, which was in the words and figures, following:





the days of the November term of the District Court of the United States for the District of Idaho, Northern Division, before the Honorable Frank S. Dietrich, presiding as Judge of said court and a jury, this cause came on for trial on the pleadings heretofore filed herein, Mr. Therrett Towles and Mr. W. H. Plummer appearing as attorneys for the plaintiffs and Mr. James A. Wayne appearing as attorney for the defendant.

And thereupon the plaintiffs to maintain the issues on their part introduced the following evidence, to-wit:

EDWARD P. MORAN, produced as a witness on behalf of plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION By

MR. PLUMMER:

Q. What is your name?

A. Edward P. Moran.

Q. Where do you reside?

A. At the Interstate at present.

Q. The Interstate mine, I believe you mean that?

A. Yes.

Q. When you use the word Interstate, you mean the defendant the Interstate-Callahan Consolidated mines?

A. Yes, sir.

Q. How long have you been working there, Mr. Moran?

A. Since the first of the year.

Q. You were working there at the time of the death of Mr. Witkouski, were you?

A. I was.

Q. In what capacity were you working, what kind of work were you doing?

A. Sinking a shaft.

Q. Where was that shaft located with reference to the mine, just in a general way,—I don't care particularly.

A. About a mile and a half in the tunnel.

Q. The mouth of the shaft, however, came up into a tunnel—the whole thing was underground, I assume?

A. Yes.

Q. Who was with you in sinking this shaft?

A. Herb Erickson, Aleck Davey, and Charlie Witkouski.

Q. What office or what position did Witkouski hold?

A. He was pusher.

Q. Is that the same as straw boss, as we understand it?

A. Just about.

Q. In other words, he had charge of just you men there, I assume, in sinking this shaft?

A. Yes.

Q. Who had charge of the hoist at the time he was killed?

A. Joe Egbert.

Q. Who had charge of him, I mean with reference to the hoist?

A. Well, Charlie Witkouski had charge over him, that is, in giving signals and giving him orders about timber and one thing and another.

Q. But I mean about taking care of the hoist, who did boss him with reference to that? Who would he report to about the difficulties—

A. He reported to McDonald, or the master mechanic.

Q. What position did Mr. McDonald hold?

A. He was foreman.

Q. And the master mechanic was whom?

A. Mr. Hughes.

Q. I understand you to say then that the only thing he had to do with the hoist man was to tell him when to hoist up and when to hoist down, and when to put timbers in the bucket to let down?

MR. WAYNE: I don't think he should lead the witness.

THE COURT: Yes, avoid leading questions. He has already answered it.

MR. PLUMMER: Q. Did you go on shift with Mr. Witkouski on this occasion when he was killed?

A. I did.

Q. What time of day was that?

A. We left about half past ten or twenty minutes after ten, and arrived in there about ten minutes to eleven, and went on shift at eleven.

Q. What did you do before you went down the shaft?

A. We put on about three coils of cable on the drum. They were re-coiling the cable at the time.



Q. It took two or three men to do that, did it?

A. It took the crew; we were all three.

Q. What do you mean by the drum?

A. The drum of the hoist.

Q. Do you mean that the cable that hoisted the bucket up, that you was looping it on the drum?

MR. WAYNE: I object to counsel leading the witness. There is a way to get at that, if it is material.

MR. PLUMMER: I don't want to lead, Your Honor, excepting in a matter that can't be disputed, Your Honor. I want to get over the ground.

MR. WAYNE: I object to getting over the ground by Mr. Plummer testifying.

MR. PLUMMER: I am not testifying.

Q. Tell what you were doing about rolling this cable on to the drum, and what it was, and what it was made of, and how you put it on.

A. This cable was a new cable, and we had to re-coil it every once in a while, on account of it stretching and making a lump in the cable, which, when hoisting or anything, would make the cable jump and wear it out, so we would have to re-coil it occasionally, and they were just finishing re-coiling the cable—that is, we finished it; they had about three coils to put on, and we told them we would finish the job, and their time was up, and we finished re-coiling the cable. And the other shift had left one man down at the bottom of the shaft to lay the cable, because generally when we was re-coiling the cable we would pull the cable all down to the bottom of the



shaft, and re-coil it, by hauling it up above and straightening it up on the drum.

Q. That was done preliminarily to getting down the shaft?

A. Yes sir.

Q. When you got ready to go down the shaft what did you do?

A. We put in about five lagging in a bucket. We hoisted the bucket up from the bottom at first, to the top, and we put in five lagging in the bucket, and we got, the four of us got on the bucket to go down.

Q. How did you get on?

A. We got on the rim of the bucket.

Q. Describe how you was on the rim of the bucket.

A. We were standing on the rim of the bucket, holding with one hand or both hands on a chain, two chains attached to this bucket.

Q. Was Charlie Witkouski one of this crowd?

A. He was. He was facing me, hanging on the same chain I was.

Q. How long had you worked there in that shaft?

A. From the time it started.

Q. How long was that?

A. I think it started—I am not quite certain, but either February or March, the 20th.

Q. How long had that custom existed with reference to being lowered down the shaft in the way you have described, with the men standing on the rim of the bucket, as you have described?

MR. WAYNE: I object to that as immaterial, if Your Honor please. It is not one of the charges of negligence in this case that there was anything improper in the manner in which they were lowered down.

MR. PLUMMER: Of course we can't tell—

THE COURT: I think I will let them show the conditions under which the accident happened, and this would be one of them; otherwise the jury might get the impression that it was unusual, that maybe it was unusual.

MR. PLUMMER: We have admitted that it was usual, but we didn't acquiesce in it. Therefore I have assumed that fact, and ask how long it had existed, how long they had been going down in that way.

MR. WAYNE: We will be given an exception to every adverse ruling, Your Honor?

THE COURT: All adverse rulings will be deemed to be excepted to.

A. Since the shaft was started.

Q. How long before the accident, about how long?

A. Almost three months, I think.

Q. And you had three shifts a day that did the same thing?

A. Yes, sir.

Q. When you got on to this bucket, and after you had been around the hoist, as you have described, putting this coil on, you and the gang, did you notice anything about the hoist to indicate that there was

going to be any slip or anything, or any defect in it, or anything of that kind?

A. I did not.

Q. When you started down on this bucket, you and the gang with you, you and Mr. Witkouski, just describe what happened from that down, now, in your own language.

A. We got on the bucket, at the collar of the shaft, and started down, with these lagging in the bucket, five lagging, and we started off naturally, as we always had, until we got about thirty feet down the shaft, and we got about thirty feet, and I passed the remark to the rest of the boys, I says, "We are going quite fast this evening," and I no more than had them words out of my mouth until Charlie Witkouski said, "There is something wrong," and he held on to the cable with—on to the chain with one hand, and tried to grab the timber with the other.

Q. Where was this timber?

A. Dividers. This was a three compartment shaft. He tried to catch one of the dividers with his arm; and I see—my light was shining on him so I could see him, and I see he didn't make it, so I saw there was no chance for the rest of us, and so I thought I would stay with the bucket. He left go the chain with his hand, and he tried to grab the divider further down with both hands, and I seen him make about a turn or two in the air until my light went out too, and after my light went out we didn't know what happened; but the bucket started to slacking up, and as the bucket slackened up the hoist

man finally stopped the bucket, and Herb Erickson got off on the manway side, and Aleck Davey and I went down to the bottom, and when we got down to the bottom Charlie Witkouski was laying dead, with Billy Reese holding his head up. So I says to Billy Reese, I says—

MR. WAYNE: I object to that as hearsay, Your Honor.

MR. PLUMMER: I think it is part of the *res gestae*.

MR. WAYNE: What this witness said isn't material.

MR. PLUMMER: Certainly; it is part of the *res gestae*. It happened at that particular time.

THE COURT: Objection sustained.

MR. PLUMMER: Q. How fast, in your estimation, was the bucket going, dropping, I mean, going down, when Witkouski made the remark that there was something wrong—in your estimation about how many feet per second, as near as you can judge?

A. At the time when he said there was something wrong, to the best of my estimation—how do you want that—in minutes?

Q. I would like to have it about how many feet per second, as near as you can judge? I don't suppose you can be accurate, but you saw him and I didn't.

A. About twenty to twenty-five feet per second.

Q. State whether or not the speed accelerated and went faster after that?

A. It went faster after that.



Q. What is the fact with reference to the speed increasing substantially after that? Can you describe how it did increase?

A. Well, it went faster, but I don't know how far exactly, because it was very hard to judge.

Q. State whether or not the whole thing happened very quickly, within a few seconds?

MR. WAYNE: I don't think counsel should insist on leading the witness, if the Court please.

MR. PLUMMER: That isn't leading.

MR. WAYNE: I am addressing my objection to the Court, Mr Plummer.

MR. PLUMMER: I understand that.

THE COURT: Objection sustained.

MR. PLUMMER: Q. How long a time did this whole thing consume from the time Witkouski made the remark that he thought there was something wrong until he made a jump and was killed or fell?

A. It was a matter of but a very few seconds.

Q. About how fast was the bucket going when he jumped to grab these timbers? How fast do you think it was going then?

A. It was going about twenty-five, to the best of my estimation, about twenty-five feet per second.

Q. State whether or not it was light or dark in the shaft, outside of the lights. I don't mean what illumination your lights gave that you were carrying.

A. It was perfectly dark outside of the electric lights at the bottom.

Q. As you and the gang you was with went down did you have any lights?



A. We all had lights.

Q. What kind of lights?

A. Carbide lamps.

Q. And as you were going down what, if anything, did the speed you were going at, what effect did it have on these lights?

A. It took our hats off, with our lamps on our hats.

Q. You mean the speed lifted them right off?

A. Lifted our hats off.

Q. About how much do you weigh, Mr. Moran?

A. About a hundred and seventy.

Q. How much did Mr. Witkouski weigh, approximately?

MR. WAYNE: I don't see the materiality of this.

MR. PLUMMER: I want to show the weight of this whole load and its operation on the hoist, as the basis for expert testimony.

MR. WAYNE: That is not a question in this case. They have designated certain acts of negligence. In so far as the hoist is concerned, they have alleged certain defects. They are confined in their proof to those defects which they have alleged. There is no allegation that it was carrying more than a hoist of that capacity should carry, or that it was carrying too great a weight.

THE COURT: I don't understand that to be the claim now. It is simply preliminary to some other question. It isn't contended that the hoist was overloaded?

MR. PLUMMER: Oh no.

THE COURT: All right. He may answer.

MR. PLUMMER: Q. How much did Witkowski weigh?

A. About a hundred and forty or forty-five.

Q. Without going into details, about how much did the whole thing weigh, take the bucket and the lagging, and the four men on it, and the appliances of the bucket, cross-bar, and the whole thing, about what did the whole thing weigh there, as close you can estimate it?

A. Close on to twelve hundred pounds.

Q. What did you think yourself as to the danger of injury to yourself, or death to yourself, by reason of the speed that you was being taken down that shaft at that time?

MR. WAYNE: I object to that, if the Court please, as incompetent, irrelevant and immaterial.

THE COURT: Overruled.

MR. WAYNE: An exception.

MR. PLUMMER: Q. What did you think?

A. I thought at first that we were going to be piled up in the bottom. But I see we were going too fast, that we couldn't make it, and I thought I would take a chance.

Q. Take a chance of going down with it, rather than do what Witkowski did?

A. Yes.

Q. State, if Witkowski had of happened to have got hold of the lagging he was grabbing for, or the timber you speak of, did it appear to you that the

danger was sufficient to justify you in making a like attempt to jump out and grab this?

MR. WAYNE: The same objection to that question.

THE COURT: Overruled.

(Last question read.)

A. It did, if he had caught.

MR. PLUMMER: You may take the witness.

CROSS EXAMINATION BY MR. WAYNE:

Q. Mr. Moran, how long had you worked in this shaft?

A. From the time it was started.

Q. And that was some time about the 8th of March, 1916, was it not?

A. Well, the station was cut at that time, but I don't think we started on the bonus until the 20th.

Q. You worked on Witkouski's shift all the time that you worked on that shaft, didn't you?

A. Yes, I did.

Q. And it was what was called the new shaft?

A. It was.

Q. And it was in process of being sunk at the time of this accident?

A. Yes.

Q. And it was customary where a shaft is being sunk, and before it has finally been finished up, to use a bucket rather than a cage, is it not?

A. Yes, sir.

Q. That is always the custom?

A. Yes, sir.

Q. And the buckets used elsewhere where you

have worked were of the same general type as this bucket?

A. They were.

Q. Now you were on the night shift that night?

A. Yes, sir.

Q. And the shaft crew that you worked on consisted of Witkouski, yourself, Erickson, Davy, and Egbert, did it not?

A. Yes, sir.

Q. And you called Witkouski the pusher?

A. We did.

Q. But as a matter of fact he was boss of that gang, was he not?

A. Yes.

Q. And he gave orders to all of you, did he not?

A. He gave orders to us and the hoist man, according to the timber and things like that, as far as I know.

Q. And you had formerly seen Witkouski on different occasions order Egbert what to do and what not to do, had you not?

A. Yes, sir.

MR. PLUMMER: If Your Honor please, I don't think that is proper cross examination. I think he ought to confine it to whether, with relation to the hoist itself, or giving signals to raise and lower it. It might be misunderstood. It is a kind of composite question.

THE COURT: Well, you can make it clear later if you think it is not clear.

MR. WAYNE: Q. And you had even seen and

heard Witkouski order Egbert to other parts of the mine, had you not, to get powder and fuse?

A. Yes.

Q. And Egbert always obeyed his orders, did he not?

A. He did.

Q. And on the occasions when Egbert would be sent by Witkouski to other portions of the mine, Witkouski himself would run this hoist wold ne not?

A. He has, yes.

Q. And you have seen him do it?

A. Yes.

Q. You knew, all of you, when you went to work at about eleven o'clock this night of the accident, that the crew which preceded you had been re-coiling the cable?

A. Yes, sir.

Q. That crew was Jonas Jacobsen's, was it not?

A. Yes.

Q. And a man by the name of Lytton was the hoist engineer, was he not?

A. I think so.

Q. And you in connection with Witkouski and the other men on your shift, had on other occasions re-coiled the cable on the drum, had you not?

A. We had.

Q. And it was customary and proper when you were re-coiling the cable to first loosen the clutch, so as to pull the cable off without pulling against the clutch, isn't that correct?

A. That I don't know.



MR. PLUMMER: We object to that as not proper cross examination. I haven't gone into what they had to do in order to put the cable on. That is part of their case, if they want to show assumption of risk or contributory negligence.

MR. WAYNE: The witness testified that they finished the job. I want to show that because of the fact, that is, that the cable was not completely recoiled, that they knew the condition the hoist would have to be put in.

THE COURT: The objection is overruled.

MR. WAYNE: What did you answer?

A. That I don't know.

Q. You don't know whether they would or not?

A. No.

Q. When you went on shift did you hear either Jacobsen or Lytton tell Witkouski that they had loosened the clutch?

A. No.

Q. The job of re-coiling the cable was not finished when you went to work?

A. It was not.

Q. And Witkouski told Jacobson and the men on his crew to go off shift, that he and his men would finish the job, didn't he?

A. Yes.

Q. And then you did re-coil about how many feet of cable?

A. About three coils on the drum.

Q. Now it is nothing unusual for a new cable to get these kinks, as you call them, in it?

A. No.

Q. And it has to be pulled off the drum by the men and then re-coiled?

A. Yes.

Q. Do you re-coil it by hand or with the engine?

A. With the engine.

Q. And as it is re-coiled on the drum the men straighten out the kinks so that it may wind up as near perfectly as possible?

A. Yes.

Q. Now, after Witkouski told the other men that he would finish the job, and after the job was finished, what did he next do? He began with the rest of you men to fill the bucket up with lagging, didn't he?

A. We put in five lagging in the bucket.

Q. The lagging you were using at that time was fir, was it not, fir lagging?

A. Yes, I think it was.

Q. And it was pretty wet too, wasn't it?

A. Well, like any ordinary lagging would be, green timber.

Q. Yes, it was green timber?

A. Yes.

Q. And it was five foot lagging?

A. Two inch lagging, five foot long.

Q. Five foot long, and of random widths?

A. The average width would be about twelve inches.

Q. And some of them as wide as twenty-four, weren't they?

A. Well, there were some of them, yes.

Q. Isn't it a fact that it was strictly against the orders and instructions to carry men on the bucket when it had anything else in it, either lagging, or materials, or muck?

MR. PLUMMER: We object to that as not cross examination.

THE COURT: Overruled.

MR. PLUMMER: And, besides that, it is admitted in the pleadings that it was customary to do that.

MR. WAYNE: No, it isn't.

MR. PLUMMER: Well, I say it is.

A. Yes, it is customary to take timber down with us.

MR. WAYNE: Q. Hadn't you heard McDonald finding fault with Witkouski a few weeks before this for riding on a bucket that had other materials in it?

MR. PLUMMER: The same objection, on the ground that it is not cross examination, and an attempt to prove contributory negligence on cross examination, when there has been nothing of that kind indicated on the direct examination.

THE COURT: Overruled.

MR. PLUMMER: An exception.

MR. WAYNE: Go ahead.

A. I do not know.

Q. You don't remember whether you did or not?

A. No.

Q. Now, after the lagging was loaded in the bucket who told you to get upon the bucket?

A. Nobody. It is customary for us to get on without being told.

Q. On this particular night didn't Witkouski order the men on the bucket, or do you remember?

A. I do not remember.

Q. Now, the manner in which you got upon the

Q. You don't remember whether you did or not?

A. The customary way.

Q. You never get into the bucket, do you?

A. Sometimes—if there is two men want to go down and feel like getting inside the bucket.

Q. As a matter of fact, how large is the bucket?

A. To the best of my estimation, about thirty inches across, in diameter.

Q. It is just like a large, galvanized iron or steel barrel, isn't it?

A. Yes.

MR. WAYNE: Will you mark these as defendant's exhibits?

(Two certain photographs were marked DEFENDANT'S EXHIBIT NO. 1 and 2.)

Q. Would you recognize a photograph of that bucket?

A. Yes.

Q. Showing you Defendant's Exhibit No. 1, is that it?

A. Yes, sir.

Q. That is this very bucket, is it not?

A. I think it is. There are three of them, but they are all the same.

MR. WAYNE: I offer Defendant's Exhibit No. 1 in evidence.



MR. PLUMMER: No objection. If you had shown those all to me in the first place we would probably have saved time, because I would probably admit all of them without objection.

MR. WAYNE: Q. Showing you Defendant's Exhibit No. 1, that is the top of the bucket in question, or one just like it, showing the cross head, is it not?

A. That is it. There is an attachment to this though, from what it was before.

Q. What is that?

A. This cable here.

Q. That has been put on extra.

A. Safety device, yes.

Q. It is an additional safety device?

A. Yes.

Q. At the time of the accident the bucket was provided with what is called a safety cross head, was it not?

A. Yes.

MR. WAYNE: I offer Defendant's Exhibit No. 2.

MR. PLUMMER: I have no objection to it, excepting, if Your Honor please, the witness says part of it wasn't on the bucket at that time.

MR. WAYNE: Well, we can't very well take it off the photograph.

MR. PLUMMER: Let us cross it then with a pencil so we will know what it is.

MR. WAYNE: It is the cable that runs up this way (indicating).



THE COURT: Just mark it with a cross so that the jury will know what it is.

MR. WAYNE: The cable which you refer to which wasn't on at the time

MR. PLUMMER: Make a series of crosses around the cable, about four of them.

(Counsel marked certain crosses on exhibit with pencil.)

MR. PLUMMER: No objection to that, with that modification.

MR. WAYNE: You just step over before the jury so that they can see this photograph.

Q. The safety cross head is a device to stop the bucket when it begins to fall, is it not?

A. Yes, sir, it is a device to stop the bucket, yes, if the cable is detached up here (indicating).

Q. The proposition is this, that this spring is compressed as it stands, is it not?

A. Yes.

Q. And the moment the cable breaks it releases this spring, and the spring flies downward?

A. Yes, sir.

Q. And when the spring flies downward it pulls the two levers running to the cross head?

A. Yes.

Q. And pulling them down, it shoots a sort of a dog into the guide?

A. Yes.

Q. And the faster the bucket is falling, the greater the weight in the bucket, the faster these dogs will hold, is it not?

A. Yes.

Q. They shoot out at either side into the guides?

A. Yes, sir.

Q. And the bucket was provided with this fixed safety cross head at the time of this accident?

A. It was.

Q. So that it couldn't fall in case the cable broke?

A. No.

Q. It would be caught on the guides?

A. Yes.

Q. How deep was this shaft at the time Witkowski was killed?

A. Around three hundred feet, more or less.

Q. You are just estimating that, are you?

A. Yes.

MR. PLUMMER: That is admitted in the pleadings, if Your Honor please, that it was three hundred feet.

MR. WAYNE: Q. As a matter of fact, you don't know whether it was 275 or 300?

A. Well, no, not exactly.

Q. When you men got on there you descended at the usual rate of speed for about thirty feet, you say?

A. When we started, we started with the usual gait, but as we got down about thirty feet I passed the remark that we were going quite fast.

Q. How fast was it usual and customary to lower the bucket?

A. Well, it was customary—we could have stopped the bucket if we could have got the bell cord and give the signal.

Q. That isn't exactly the question, Mr. Moran.

MR. PLUMMER: He has answered this. He says it is customary to go at the speed that he can catch the bell cord.

MR. WAYNE: He hasn't answered it.

MR. PLUMMER: I say he has.

THE COURT: No, Mr. Plummer, you shouldn't interfere. Counsel was simply saying that the witness didn't quite answer the question.

MR. WAYNE: You made no stop in going from the collar of the shaft to the bottom, did you?

A. We made one stop.

Q. I don't mean this particular night, but usually?

A. Usually?

Q. Yes.

A. Well, if we needed the lights lowered or fixed our bulk head overhead.

Q. On other occasions Mr. Moran, how fast would the hoist man lower the bucket with men in it or on it?

THE COURT: You mean how many feet per second?

Q. Yes.

A. Probably about somewheres around eight or ten feet per second. That is about as close as my estimation.

Q. About how long would it take to get to the bottom of the shaft?

A. Three hundred feet?

Q. Yes.

A. That is, in ordinary times?

Q. Yes, in ordinary times.

A. That three hundred feet would be made, we would make it in probably three-quarters of a minute.

Q. You had a rule upon the question in the Interstate, did you not?

A. I have read them, yes.

Q. And the rule was that the bucket should not be lowered or raised faster than six miles per hour?

A. Six miles per hour?

Q. Wasn't that the rule?

A. I don't know. I never read that.

(A certain photograph was marked DEFENDANT'S EXHIBIT NO. 3.)

Q. Showing you Defendant's Exhibit No. 3, that is a representation of the position which you men occupied on the bucket, that night, is it not?

A. Yes, sir.

MR. WAYNE: I offer this in evidence.

MR. PLUMMER: We have no objection to it.

(A certain paper was marked DEFENDANT'S EXHIBIT NO. 4.)

MR. WAYNE: Q. Defendant's Exhibit No. 4—you have seen the written rules of the Interstate mine, haven't you?

MR. PLUMMER: If the Court please, this isn't cross examination, I submit. He is trying to prove their case of contributory negligence by our witnesses, when we haven't asked the witness anything about it. We have only asked this witness as to what



happened that night, and about the speed it was going on that particular occasion. We haven't asked him anything about the speed on ordinary occasions or usual occasions. The law fixes that, and limits it to six hundred feet a minute. We are even willing to assume that they went too fast previous to this time. We haven't asked him about rules or customs as to speed previous to this occasion. I submit it isn't cross examination. If they want to make him their witness and we can cross examine him, we haven't any objection. This man is at this time a mucker boss in that same mine, and I want to show the reason why they shouldn't be allowed to cross examine him on matters that weren't brought out.

THE COURT: I think, Mr. Plummer, you did elicit from this witness the statement that when they first started the bucket went at the customary rate of speed. That, of course, would open the door as to what the customary rate of speed is, and thus far the examination has been confined to that.

MR. WAYNE: Q. You have seen those rules, have you not?

A. I have seen them, yes.

Q. Each one of the men signs the rules at the time he goes to work, does he not?

MR. PLUMMER: Wait a moment. Just a moment. We object to that as not cross examination.

THE COURT: Sustained.

MR. WAYNE: Q. You have noticed the rule as to the rate at which the bucket should be lowered or raised, have you not?



A. I did not notice it, didn't pay any attention to it.

Q. When you men went on shift that night you have said that the work of re-coiling the cable was not completed. Was it not usual and customary, and required by the rules of the company, when the hoist had not been used for some time, or when the cable had been re-coiled upon it, to make at least one round trip up and down the entire depth of the shaft, to test it out and see whether it was working properly or not?

MR. PLUMMER: We object to that as not proper cross examination, and for the further reason that the law of the State of Idaho provides that that shall be done, as an absolute duty of the master, which can not be delegated.

MR. WAYNE: No, the law doesn't require that.

THE COURT: I doubt whether this a proper cross examination, Mr. Wayne. The objection will be sustained upon that ground, not upon the other.

MR. WAYNE: Q. On this occasion the hoist, or the bucket, was simply brought up from the bottom of the shaft, and loaded immediately, and you men went down in it?

A. It was.

Q. Now after you had descended for the distance of thirty feet, and when you say the hoist got to going faster, your estimate of that speed is just a guess, is it not?

A. Just a guess.

Q. You don't know whether it is even approximately correct?

A. What do you mean by that?

Q. You don't mean to tell the jury that you are accurate in your estimate of its going twenty to twenty-five feet per second?

A. Not accurate, no.

Q. Do you know how fast a body, unobstructed, fall the first second.

A. I do not.

Q. When Witkouski jumped from the bucket he caught one of the dividers, did he not?

A. He tried to.

Q. Well, he caught it, and broke his hold afterwards, didn't he?

A. He made two attempts.

Q. And in either of those attempts, did he succeed in catching hold of the divider?

A. In the second attempt he held a little bit, very little.

Q. These dividers are of wood, are they not?

A. Ten by ten timbers.

Q. This was a three compartment shaft?

A. Yes.

Y. And the divider is a 10x10 timber, that divides the different compartments of the shaft?

A. Yes, sir.

MR. WAYNE: That is all.

RE-DIRECT EXAMINATION By

MR. PLUMMER:

Q. What work are you doing now, Mr. Moran?

A. I am mucker boss.

Q. For this same mine?

A. Yes, sir.

Q. How far, in your estimation, from the time the speed commenced to increase, after you had gone you say about thirty feet, from that point until the bucket was finally stopped, how far did the bucket go down the shaft?

A. From the time we noticed it running away until it stopped?

Q. Yes.

THE COURT: You mean absolutely stopped?

MR. PLUMMER: Well, under control, I will say, apparently.

A. About 150 feet.

Q. State what the fact is with reference to the speed after Witkouski jumped, whether it increased or decreased immediately after he got out?

A. It increased for a little bit.

Q. You have been asked about these safety clutches. Will you come over here, Mr. Moran. I would like to have the court see this also.

MR. WAYNE: I have another photograph just like that the court can see.

MR. PLUMMER: Very well.

MR. WAYNE: (Handing photograph to the Judge) These are duplicates.

MR. PLUMMER: Q. State what the fact is with reference to these safety clutches that you say grip the sides whenever the cable breaks or becomes detached from the cross head.

A. This spring here would come down and pull these levers down which press against the—

Q. Spread out?

A. Spread out against the—

Q. But will they spread out in that way so long as the cable is connected and there is resistance from above?

A. No, it will not.

MR. PLUMMER: That is all.

RE-CROSS EXAMINATION By

MR. WAYNE:

Q. It will if there is a catch in the cable that causes it to jerk, will it not, anything which will release that spring will throw the dogs into the guides?

A. That will depend on how close the bucket is to the top, to give the spring in the cable.

Q. Now, Mr. Moran, on this particular night how far did you say the bucket dropped after it began to go faster than usual?

A. To the best of my estimation about 150 feet.

Q. And in what manner was it stopped?

A. It stopped kind of gradually.

Q. Gradually and without any very perceptible jar?

A. No.

Q. And the three men who were in the bucket got out?

A. Just one man got off.

Q. Erickson?

A. Erickson got off.



Q. And the three men who remained in the bucket were uninjured?

A. We had a little minor scratches on us, not anything to hurt any.

Q. Nothing to hurt?

A. Not much.

MR. WAYNE: That is all.

RE-DIRECT EXAMINATION By

MR. PLUMMER:

Q. You have been asked about these rules, Mr. Moran, and this paper was handed you. Did you say whether or not you recognize those as the rules of the company?

A. I didn't read the whole thing.

Q. I will ask you about rule 28 in particular. State whether or not that was a rule in force in that mine at that time, as you understood it?

A. It was customary, yes.

Q. The word "mechanical department" here, what does that include, what men, I mean?

A. Mr. Hughes is master mechanic.

Q. And he is the head of that department?

A. I think he is.

MR. PLUMMER: I would like to offer in evidence, if Your Honor please, Rule 28 of this piece of paper that the witness has said he recognized as being the rules, and especially 28.

MR. WAYNE: There is no objection to the entire rules going in evidence.

MR. PLUMMER: You can put them in evidence



if you want to. I will put in mine, and you can put in yours.

THE COURT: Very well.

MR. PLUMMER: It is very short, and I will read it at this time, just to keep the connection in the testimony:

“It shall be the duty of the Mechanical Department to daily inspect the hoisting ropes and engines to see that the same are in a safe condition and in proper repair, and if at any time the rope or any part of the machinery shall appear to be out of order, to have the same repaired before continuing with the hoisting.”

That is all.

RE-CROSS EXAMINATION:

MR. WAYNE: I desire now to offer all of the shaft and hoisting rules, if Your Honor please.

MR. PLUMMER: We shall object to that at this time as not proper cross examination.

THE COURT: What ones are they?

MR. WAYNE: It begins with rule 26 and runs through rule 32.

MR. PLUMMER: There is no objection to the one with reference to speed, because I think that is cross examination under the ruling Your Honor made, but I don't think the rest of them are cross examination.

MR. WAYNE: That is rule 29.

THE COURT: The objection is overruled.

MR. WAYNE (reading): “SHAFT AND HOISTING RULES.

“26. Engineers in charge of hoisting engines at

the change of shift and at meal times shall first send down the cage empty to ascertain that the shaft is clear and safe before lowering men down in the shaft. These rules apply to raise also.

“27. Not more than four men at a time shall ride on each deck of the cage at the mine. Riding upon timber skip in any shaft, raise, winze or elsewhere is positively forbidden.

Rule 28 was just read by counsel for the plaintiff.

“29. Tools, steel, drills, timber and other material must not be lowered or hoisted except when placed inside cage or other conveyance and made safe by fastening. When men are hoisted the cage or other conveyance must commence to slow down within one hundred feet of the sheaves.”

Q. What are the sheaves?

A. The sheave wheels.

Q. The wheels on which the cable runs?

A. Yes.

MR. WAYNE (continuing reading): “Men must not be lowered or hoisted at a speed greater than six miles per hour, and when the cage on which men are being lowered approaches a station where chairs are in use, the speed of the cage must be materially lessened.”

“30. No employee must leave the shaft at any station, without first seeing that the bar is properly placed in position, so as to prevent anyone walking into the shaft opening.

“31. Cage men must, immediately after the cage

is hoisted, remove the chairs and see that everything is clear for the cage to pass.

“32. No one shall pull the electric signals or bell rope but the cagers unless by express permission of the Foreman.”

Q. What was the custom in regard to inspecting this hoist?

MR. PLUMMER: I think I shall object to that as not cross examination. I said nothing about that.

MR. WAYNE: He has brought out the rule upon the subject on his examination.

THE COURT: The objection is sustained, as not being cross examination.

MR. WAYNE: Q. Hughes was the master mechanic at this time, was he not?

A. He was.

Q. And he had one assistant, did he not?

A. I think he had.

Q. Elmer Fenstrom?

A. Yes.

Q. Isn't it a fact that either Fenstrom or Hughes made daily inspections of that hoist?

MR. PLUMMER: We object to that unless he knows that they made daily inspections.

MR. WAYNE: Well, I assume that the witness won't testify to anything he doesn't know.

A. I do not know.

Q. Have you ever seen either one of them there inspecting it?

A. Not to my knowledge.

Q. You are usually working at the bottom of the shaft?

A. Yes, sir.

MR. WAYNE: That is all.

RE-DIRECT EXAMINATION by

MR. PLUMMER:

Q. I would like to have you make one question clear, Mr. Moran, that you answered on cross examination. You were asked the question as to whether or not Mr. Witkouski gave orders to the hoist man, and whether or not the hoist man accepted and obeyed those orders. I want you to state now what particular orders you had reference to.

MR. WAYNE: I think that was made plain.

MR. PLUMMER: The court suggested that I could make it plain on re-direct.

THE COURT: Yes.

A. The particular orders on that?

THE COURT: That is, if there were any particular orders.

A. Why, giving signals when to hoist and lower the bucket, and in case, when we were in a hurry, when we wanted to blast, or something like that, he would send him after powder, in order to save time.

Q. Is that all?

A. That is about all.

MR. PLUMMER: That is all.

RE-CROSS EXAMINATION by

MR. WAYNE:

Q. He used to send him on errands any place in the mine, didn't he?



A. As to that I don't know. He did not send him off the level.

Q. But Egbert took his orders from Witkouski?

MR. PLUMMER: We object to that as being already covered; he asked the question before.

THE COURT: The difficulty about it is that you asked him for some particular orders, and the question is whether those were all of the orders.

MR. PLUMMER: He said those were all he knew of.

THE COURT: He said about all. Did Egbert take orders from anyone except Witkouski?

A. He took orders from the master mechanic, according to his hoist, I suppose, which everyone does, hoisting.

THE COURT: You may proceed.

MR. WAYNE: Q. As a matter of fact, just before you went down in the bucket on this particular night, Witkouski attempted to send Egbert for some fuse didn't he?

A. On this particular night?

Q. Yes.

A. Not that I know of.

Q. Isn't it a fact that he told him to go to some portion of the mine, naming it, and get some fuse, and that Egbert told him there would be no one to run the hoist if he did, or words to that effect?

A. I don't remember that.

Q. You mentioned in your direct examination something about working for a bonus. You men were working there for day's pay and an additional



bonus, depending on the amount of work you did, the number of feet you sunk in a given month?

A. Yes, sir.

Q. And you were attempting to do the work, for that reason, as fast as possible?

A. Save as much time as we could.

Q. And Witkouski, it was his habit to rush the work as much as possible, was it not?

MR. PLUMMER: That isn't cross examination, I submit, if Your Honor please.

THE COURT: Overruled.

(Last question read.)

A. Yes, to do as much as we could.

MR. WAYNE: That is all.

RE-DIRECT EXAMINATION by

MR. PLUMMER:

Q. What was done with the bucket when you first went down on shift, that is, I mean where was the bucket when you first went on?

A. At the bottom of the shaft.

Q. What was done with it before you folks got into it?

A. Hoisted it to the collar, hoisted 300 feet, or wherever it was; I don't exactly remember.

MR. PLUMMER: That is all.

MR. WAYNE: That is all.

HERBERT ERICKSON, produced as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION by

MR. PLUMMER:

Q. State your name?

A. Herbert Erickson.

Q. Where do you reside, Mr. Erickson?

A. Interstate.

Q. Who are you working for?

A. Interstate Mining Company, Interstate-Callahan.

Q. You are working for them now?

A. Yes, sir.

Q. In what capacity?

A. Stope boss.

Q. Were you working for them at the time Mr. Witkouski was killed?

A. Yes, I was working in the shaft.

Q. Who with?

A. With Witkouski and Ed Moran and Charlie—

Q. Ed Moran is the man who just left the stand?

A. Yes.

Q. Did you get on the bucket with Moran and Witkouski at the time it was lowered, when he was killed?

A. Yes.

Q. And how were you all standing on the bucket?

A. We was standing facing each other on each side.

Q. Where were you standing, with reference to the rim of the bucket?

A. Standing on the rim of the bucket.

Q. What did you notice, if anything, with refer-

ence to how the bucket went down that particular time? Just describe that in your own way.

A. Well, it did not start off unusual. After we got down a ways it started to speed up, and Ed Moran made a remark that we were going unusually fast, and Charlie said there was something wrong.

Q. Who do you mean by Charlie?

A. Charlie Witkouski.

Q. All right. And then what is the fact in reference to the speed at that time, either getting faster or slower?

A. Well, it kept on getting more faster.

Q. And how far did it drop before it was finally under control?

A. I should judge about 150 feet.

Q. How much of that 150 feet had it gone down before Witkouski made a grab to save himself?

A. I couldn't say.

Q. Just give your estimate about it.

A. I don't know where he was when he grabbed or jumped, or anything else.

Q. You didn't see him make the grab?

A. No, I didn't.

Q. What was you doing, the reason you didn't see him?

A. Well, I was standing on the same side as him, and I was facing the other way, the same as he was. I couldn't see him, but I could see the opposite party.

Q. What did the momentum of the bucket, what effect did that have on your hat and the light on your hat?

MR. WAYNE: That is leading, if Your Honor please.

MR. PLUMMER: That isn't leading.

THE COURT: Overruled. Answer the question.

A. It raised the hats off of our heads.

Q. How much do those carbide lamps weigh, how heavy are they, when they are filled with whatever material they are burning?

A. I couldn't say for sure.

Q. Just an estimate. I don't care about the exact ounces?

A. Four or five ounces, I guess.

Q. How did the situation appear to you, as to whether or not there was any threatened danger to you?

MR. WAYNE: I want to save the same objections to this line of testimony that I did to the testimony of the other witness.

THE COURT: Yes. It may be received under the same objection.

MR. PLUMMER: Q. At the time Witkouski jumped.

A. Well, I thought we was going to the bottom.

Q. State how it appeared to you. You say you would go to the bottom. Of course you would go to the bottom no matter how fast you were going. But how did it appear to you, with reference to your being in imminent danger of being injured or killed? What did you think about it?

A. Well, I thought at first the best way to get out would be to jump, and then I changed my mind and

gripped on the chain and looked down, and saw the light coming up pretty fast, and I says, "I guess it is off", and that is all.

Q. What did you mean by that?

A. I thought we would strike bottom and get smashed up.

Q. When Witkouski got off, jumped off, about how fast was the car going down at that time, that is, the bucket going down at that time?

A. I don't know when he jumped.

Q. That's right. You don't know when he jumped. This gang that was with you consisted of Mr. Witkouski, yourself, Mr. Moran, and who else?

A. Aleck Davey.

Q. Do you know where Aleck Davey is?

A. He was over at Thompson Falls, Montana, the last I heard of him.

Q. You were all sinking this shaft?

MR. PLUMMER: I think that is admitted.

MR. WAYNE: No.

MR. PLUMMER: Q. You were all sinking this shaft, were you?

A. Yes.

Q. That is the work you were doing, this crew?

A. Yes.

Q. What did Witkouski have to do with the hoist, if anything, and the hoist man?

A. Nothing that I know of, only I think he could have fired him.

Q. I didn't ask you about firing him. I am asking you what he had to do with him, with reference



to what orders he gave him, and with reference to what did he give orders? What orders did he give Egbert?

A. He gave him orders where he wanted to go up or down.

Q. Was that all?

A. That is all, as far as I know.

MR. PLUMMER: Take the witness.

CROSS EXAMINATION by

MR. WAYNE:

Q. As a matter of fact, Witkouski was the boss of that crew, was he not?

A. Yes.

Q. And the hoist man was a part of the crew?

MR. PLUMMER: Just a moment. We object to that as calling for a conclusion of the witness.

THE COURT: Overruled.

Q. Isn't that the fact, Mr. Erickson?

A. Yes.

Q. And you, all of you, including the hoist man, took your orders from Witkouski, didn't you?

A. Yes.

Q. And Witkouski gave orders to the hoist man not only when he wanted to be lowered or raised, but he gave him other orders, as to how to do his work in and about the mine, didn't he?

A. I don't know.

Q. Have you never seen Witkouski or heard him direct Egbert to go to other portions of the mine and get fuse and powder or the like?

A. No, I never heard him tell him.

Q. You don't know whether he used to give such orders as that or not? You think that Witkouski had the power to discharge Egbert if he was not doing his work satisfactorily?

MR. PLUMMER: Wait. Wait. Wait. We object to that as calling for a conclusion of the witness as to what he thinks about the power of an officer, as not competent.

MR. WAYNE: It is proper cross examination. He went into it on direct examination.

THE COURT: Well, he has already answered it, hasn't he? He said he thought he had power to fire him. I suppose the jury will know what he means by that.

MR. WAYNE: That was on direct examination.

THE COURT: Very well.

MR. WAYNE: Q. Isn't it a fact that just a short time prior to this accident you yourself heard Witkouski threaten to fire Joe Egbert for not raising or lowering him fast enough in that shaft?

MR. PLUMMER: Wait. Wait. We object to that as not cross examination.

THE COURT: Overruled.

MR. PLUMMER: An exception.

MR. WAYNE: Q. Isn't that a fact, Mr. Erickson?

A. Yes.

Q. Now, as a matter of fact, Witkouski was rushing this work, wasn't he?

A. Yes.

Q. And the reason he was rushing it was that you

men, including Witkouski, got a bonus for all work over a certain number of feet that you did in any particular month?

A. Yes.

Q. And isn't it a fact that during all of this time Witkouski was constantly what you men call hammering Egbert to do the work fast of hoisting up and down, isn't that the fact?

A. I never heard him direct him that way.

Q. You didn't?

A. No.

Q. Never at any time? How deep was this shaft at that time?

A. About 300 feet.

Q. You had been working there since they started to sink it, had you not?

A. Yes.

Q. And during that time had you ever descended that shaft at the rate of 600 feet per minute?

A. No, I don't think so.

Q. Let me aid you in that. Had you ever gone from the collar to the bottom of that shaft in as short a length of time as one-half a minute?

A. No.

Q. Do you know what the sensation would be, and what the effect on your caps and lights would be, if you did descend in that shaft as fast as 600 feet per minute?

MR. PLUMMER: I object to that as not cross examination. I haven't asked him about the speed per minute. He said he didn't know when the man got off the bucket, he couldn't tell.

THE COURT: Sustained.

MR. WAYNE: Q. Do you know how fast this bucket was descending at the time Witkowski jumped?

A. No, I don't.

Q. Do you know whether it was going down faster than 600 feet per minute?

MR. PLUMMER: We object to that because witness says he hasn't any idea, didn't see Witkowski jump.

THE COURT: Sustained.

MR. WAYNE: Q. Witkowski succeeded in catching hold of the divider as he jumped, did he not?

A. I don't know.

Q. You don't know whether he did or not?

A. No.

Q. None of the other men jumped, did they?

A. No.

Q. When the hoist man stopped the bucket he stopped it gradually, did he not?

A. Yes.

Q. And you men were not jolted, were you?

A. No.

Q. Who ordered the men on the bucket the night of this accident?

A. Nobody ordered us on.

Q. It was customary for you to get on?

A. Yes.

Q. Was there anything on the bucket in addition to the four men?

A. There was five lagging in the bucket.

Q. Do you remember at that time of Witkouski telling Joe Egbert to go and get him some powder or fuse?

A. He started to tell him something, going down, but he never finished what he was going to tell him.

MR. WAYNE: That is all.

MR. PLUMMER: Just one question.

RE-DIRECT EXAMINATION by

MR. PLUMMER:

Q. Do you know whether or not Witkouski had the power to discharge Egbert, or are you just guessing at it?

A. No. I am pretty near sure he could fire him.

Q. You know it pretty near sure?

A. Yes.

Q. How do you know it?

MR. WAYNE: I object to that, if the Court please.

MR. PLUMMER: If a man says he knows a thing I have a right to go into it.

THE COURT: Very well. Objection overruled.

MR. PLUMMER: Q. How do you know it?

A. Well, if he didn't do his work he could fire him.

Q. How do you know he could?

A. Well, it stands to reason he could.

Q. It just stands to reason?

MR. PLUMMER: That is all.

RE-CROSS EXAMINATION by

MR. WAYNE:

Q. That is the same way you knew he could fire you yourself, isn't it?



MR. PLUMMER: Just a minute. A man don't fire himself. He either quits—

THE COURT: No. He says that is the same way he knew he could fire himself, the witness.

MR. WAYNE: Q. Is it?

A. Yes.

THE COURT: Did you recognize the right of Mr. Witkouski to discharge or fire you, as you put it?

A. Yes.

MR. WAYNE: That is all.

RE-DIRECT EXAMINATION by

MR. PLUMMER:

Q. It that the only reason you think he could fire Egbert?

A. No.

Q. It isn't?

A. No.

Q. Who hires Egbert?

A. McDonald.

Q. Who is McDonald?

A. The foreman.

Q. General foreman, is he?

A. Day foreman, yes.

MR. PLUMMER: That is all.

MR. WAYNE: That is all.

THE COURT: Gentlemen of the jury, I am going to excuse you until two o'clock, and during this intermission of the court, as well as any other that may occur during the course of this trial, be very careful to keep yourselves away from witnesses and other parties interested, and also avoid overhearing any discussion of this case, or any matter connected with

it, and refrain from discussing it even among yourselves until it is finally submitted to you. Remember the hour, two o'clock. You may be excused.

Accordingly an adjournment was taken until 2 p.m., Friday, Nov. 24, 1916.

*2 p.m., Friday, Nov. 24, 1916.*

EDWARD P. MORAN, a witness heretofore duly sworn, upon being recalled upon behalf of plaintiff, testified as follows:

DIRECT EXAMINATION by

MR. PLUMMER:

Q. Regarding your testimony this morning with reference to Mr. Witkouski at one time using this hoist, just state to what extent he used it at that time.

A. At that time I was down at the bottom, and I wanted to come up for something and Charlie, he was up above, making primers, and I rung the cage up.

Q. What do you mean by rung it up?

A. And Charlie hoist me up, and when I got up on top I see he hoist me up, and I asked him where Egbert was.

Q. Just state what happened when you got up there.

MR. WAYNE: I object as immaterial.

THE COURT: Sustained, as to what he said.

MR. PLUMMER: Q. What did he say about powder, about Mr. Egbert. That bore out that Mr. Witkouski had sent Egbert for powder.

THE COURT: You mean what he said to Mr. Egbert?

MR. PLUMMER: No. What Mr. Witkouski said to the witness about Egbert going for powder.

MR. WAYNE: That is also hearsay.

THE COURT: Objection sustained.

MR. PLUMMER: Q. You testified this morning about some occurrence when you said Mr. Witkouski had sent Egbert for powder. Did you hear him send him?

A. I did not.

Q. Do you know of your own knowledge whether or not he ever did send him?

A. That I couldn't say.

Q. How long was it before the accident occurred that he hoisted you up this hoist that time?

A. About a month.

Q. Did you ever know him to use this hoist himself any other time, this same hoist?

A. I don't remember it.

Q. This work you were doing there at the bottom of the shaft, I believe you said you was sinking a shaft, were you?

A. Yes, sir.

Q. What is the fact with reference to whether or not you, including Witkouski and the other men, were all working together doing that work?

A. Yes, sir.

Q. State whether or not you were doing the same kind of work?

A. We were.

Q. After the accident happened, and after Mr. Witkouski had been killed, when you got on top,—did you come up on top immediately?

A. I did, after going to the bottom.

Q. And what appeared to be the condition of mind around there among your gang, including Mr. Egbert, as to whether or not they appeared to be excited over the accident?

MR. WAYNE: I object to that as immaterial.

MR. PLUMMER: If the Court please, I want to show statements made under excitement at that time, as part of the *res gestae*.

MR. WAYNE: And not binding upon the defendant.

THE COURT: Sustained.

MR. PLUMMER: Does the Court mean that we will be allowed to show what was said there at the time, as to the cause of the accident?

THE COURT: I see no reason for permitting that, unless it was by Mr. Witkouski.

MR. PLUMMER: No. I mean by Mr. Egbert himself, running the hoist, under excitement, at the time or near the time,—it would be entitled to credit as being a statement made under excitement, and immediately after the accident happened, when there was no chance to state anything but the truth, and no reason for stating anything but the truth.

MR. WAYNE: It isn't what anyone said. It is the actual fact, if Your Honor please, as to what caused the accident. He can't bind this defendant by declarations made by people there at the time.



MR. PLUMMER: I don't know what Your Honor's rulings have been on that subject. I do know that in our state, statements made under those conditions, even though a few minutes may elapse between the actual occurrence of the accident and the statement made; it is considered to be practically all the same transaction, and it is admitted for what it is worth, as a circumstance indicating what did cause the accident, and upon the theory that it is presumed that at that particular time, and under those circumstances, a person would naturally state what the facts were; and it is within the discretion of the court, I admit, but the courts have always held,—our courts have allowed it there, even when a number of minutes have expired, but as to whether or not it is entitled to credit is for the jury to say. Naturally a statement made, stating the truth, under the circumstances, it seems to me it is a part of the *res gestae*, and ought to be allowed.

MR. WAYNE: If Your Honor please, the rule might be different if it was a declaration made by the party, by the defendant in a criminal case, for instance, or something of that sort, but these workmen might have expressed their opinion there at that time and their conjecture as to what caused the accident, if they know they should be brought here as witnesses, but their mere statement as to what they thought at that time is certainly not admissable.

MR. PLUMMER: May I make another suggestion? We expect to show that whatever was said was said before Mr. Egbert himself, who was oper-



ating the hoist and in a position to know what caused it. I may say further that in the case of Walters versus Spokane Railway Company, decided by the Supreme Court, where a declaration was made by a conductor, where a train had been derailed, and after the derailment had occurred and a man had been killed, nearly a year afterwards, the conductor made the remark in the presence of the people there, that it was a bad track, and that was offered in evidence and strenuously objected to at the trial, and admitted, however, by the court, and the supreme court affirmed it, and ruled specifically that it was admissible, as it happened so close to the accident that it was part of the *res gestae*, and the jury ought to have it to decide it for what it was worth. And numerous cases cited in support of it.

THE COURT: I am aware of the principle. I am not sure just how far I should recognize it in a case of this kind. The man Egbert is still alive and available,—he is a witness, is he not?

MR. PLUMMER: He is, but he is in the employ of the company.

THE COURT: Yes, but so is this gentleman, and the other gentleman who was upon the witness stand.

MR. PLUMMER: We have reason to believe that he is a hostile witness, if Your Honor please.

MR. WAYNE: If Your Honor please, that statement is entirely improper. As a matter of fact they brought him here as their witness. I haven't so much as talked to him. They have had Egbert in constant consultation, and I know it. They have had him up to their office—

MR. PLUMMER: We brought him here to prove one fact, and one only.

THE COURT: I think I shall sustain the objection for the present. I think, however, I shall permit you to furnish me the more recent authorities to which you refer. I think the principle is recognized generally only in case of necessity therefor. If the witness is here, if you subpoenaed him here, I am not so sure whether I ought to permit you to have the secondary testimony as to what occurred, but it may be that it will be admissible. I will give you an opportunity of furnishing the authority. You can recall this witness if I decide to change the ruling.

MR. PLUMMER: You may take the witness.

CROSS EXAMINATION by

MR. WAYNE:

Q. Mr. Moran, you had on other occasions heard Witkouski order Egbert to go to different places in the mine to get things for him, had you not?

MR. PLUMMER: We submit that isn't cross-examination, under the testimony just offered. He asked him about that before, and went into details and on redirect I asked him as to those particular times, and he said that was the only time, and I submit that has been gone over once.

THE COURT: The objection is overruled.

MR. WAYNE: Go ahead, Mr. Moran.

(Last question read.)

A. Not previous to the accident I hadn't. No, I haven't heard.

Q. Were you mistaken this morning when you said you had, on your cross examination?

MR. PLUMMER: We object to that on the ground the witness hasn't so testified.

MR. WAYNE: Yes, he did so testify.

MR. PLUMMER: No, he didn't.

THE COURT: I don't think he testified that he had on other occasions. He stated that he had on some occasions.

MR. PLUMMER: And he mentioned them.

THE COURT: These may be the cases to which he referred. The testimony was left in rather a general condition.

MR. WAYNE: Q. You talked to Mr. Plummer, didn't you, during the noon recess, Mr. Moran?

A. I have.

MR. WAYNE: That is all.

RE-DIRECT EXAMINATION by

MR. PLUMMER:

Q. Mr. Moran, when you went on shift, this particular shift we speak of, that this accident occurred upon, who was with you?

MR. WAYNE: I object to that as repetition. It was gone into fully.

MR. PLUMMER: I haven't asked him that yet.

THE COURT: I have understood him to answer that question two or three times, that he and the other two men and Witkouski were on that shift.

MR. PLUMMER: But I want to show who was with him going on to the shift.

MR. WAYNE: I object to that as immaterial.

THE COURT: Overruled.

MR. PLUMMER: O. Who was with you?

A. As near as I can judge, we were all together going on shift.

Q. Who were they?

A. Joe Egbert, Aleck Davy, Herb Erickson, and Charlie Witkouski and I.

Q. What was Egbert?

MR. WAYNE: I object to that.

THE COURT: That has been brought out several times, and is admitted in the pleadings isn't it?

MR. PLUMMER: I don't think so. It has been brought out that at the time of the powder proposition Egbert had charge then, the month before. I haven't shown that Egbert was the hoist man at the time of the accident.

THE COURT: That was shown this morning, wasn't it, and it is admitted, isn't it?

MR. WAYNE: Yes, it is admitted.

MR. PLUMMER: Q. At the time you all went on shift there, state whether or not you saw Mr. Egbert or anyone else inspect this hoist.

A. I did not.

MR. PLUMMER: Take the witness.

RE-CROSS EXAMINATION by

MR. WAYNE:

Q. You don't know though whether they did or not, do you?

A. I do not know. I didn't see them.

MR. WAYNE: I move that the answer be stricken out.



MR. PLUMMER: Wait a moment. Let me ask a question.

MR. WAYNE: I move that the answer be stricken out, for the reason that the witness simply shows a lack of knowledge.

THE COURT: The motion will be denied.

RE-DIRECT EXAMINATION by

MR. PLUMMER:

Q. How close were you to him all the time you were around the shaft, or around the hoist, before you went down the shaft?

THE COURT: To whom?

MR. PLUMMER: To Egbert.

A. Well, it varied.

Q. Give the court and jury some idea.

A. How much it varied?

Q. Could you see him all the time?

A. Yes.

MR. PLUMMER: That is all.

RE-CROSS EXAMINATION by

MR. WAYNE:

Q. You helped Witkouski and these other two men load the bucket with lagging, didn't you?

A. I did.

Q. Where did you get the lagging from?

A. Right close to the—within six or eight feet of the bucket.

Q. Which way from the hoist?

A. I don't understand what you mean.

Q. Well, when you would go to put the lagging in the bucket you would have your back turned to the hoist, wouldn't you?



A. Kind of side ways.

Q. You couldn't see Egbert then, could you?

A. We could if we would look sideways.

Q. And also the hoist would be between you and Egbert, wouldn't it?

A. It would.

Q. It would?

A. That is, after we were at the bucket—

Q. After you were at the bucket then you weren't where you could see him all the time, were you?

A. No.

MR. WAYNE: That is all.

MR. PLUMMER: That is all. Mr. Egbert.

JOE EGBERT, produced as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION by

MR. PLUMMER:

Q. State your name.

A. Joe Egbert.

Q. Where do you reside?

A. Interstate Mine, Wallace.

Q. That is this same mine in controversy here, is it?

A. Yes.

Q. Are you still working for that company?

A. Yes.

Q. You were subpoenaed here by us, and came in answer to that subpoena, didn't you?

A. Yes.

Q. You are the same Egbert that has been re-

ferred to here as having charge of the hoist at the time this accident occurred?

A. Yes, sir.

Q. Do you recall the accident?

A. Yes, sir.

Q. Do you recall anything about the bucket descending at some extraordinary speed on that occasion?

A. Yes, sir.

Q. What caused that to descend in that manner?

A. Well, the clutch was too loose.

Q. And, it being too loose, what did it do, how did it operate?

A. What caused it I couldn't say.

Q. That is, you couldn't say what caused it to be loose?

A. No. There are so many different possibilities.

Q. And it being loose, however, what did that cause the drum to do?

A. It worked faster than usual.

Q. Did you have any control over it for the first few seconds?

A. Not from the start.

Q. In lowering this hoist with men on it, as you were lowering it this particular day, you started out, did you, to lower it in the ordinary manner that you usually did?

A. In the ordinary manner.

Q. How was that done? How did you operate the hoist to do that?

A. Open the reverse and let her go down.

Q. What I want to get at is whether or not—ordinarily, I am speaking of now,—what held the bucket, or allowed the bucket to descend at a reasonably safe speed? How did the engine hold it, the way you usually did it?

THE COURT: What regulates the speed?

A. The reverse air.

MR. PLUMMER: Q. The reverse air?

A. It is how much air you let out.

Q. This was an air hoist, was it, compressed air?

A. Yes.

Q. And you would turn the air on or off, just as you wanted to lower the bucket?

A. Yes.

Q. And that forced the pressure against the piston head so as to hold it in reverse?

A. Yes, sir.

Q. And that is the way you started to do this time?

A. Yes, sir.

MR. PLUMMER: You may take the witness.

CROSS EXAMINATION by

MR. WAYNE:

Q. Mr. Egbert, you were working on Witkowski's shift?

A. Yes, sir.

Q. And he was your boss?

MR. PLUMMER: I object to that as not cross examination. I just asked him as to what happened on that occasion, and how he usually operated the hoist. I didn't ask him about vice principal or his authority, or anything of that kind.

MR. WAYNE: I have a right to show that, to show that he was a hoist man, and I have a right to inquire who the other men were on this shift, and their relative positions.

MR. PLUMMER: Not for the purpose of showing vice principal at all.

MR. WAYNE: Certainly when he testifies to the facts surrounding the accident I have a right to go into it. You can't put on a witness—

MR. PLUMMER: They are trying to prove now the question of vice principal, and I only asked him what happened on that occasion.

THE COURT: I think I will let him answer this question. I am not sure how far I should permit him to go, but this certainly wont hurt you. You have already shown this fact, haven't you?

MR. PLUMMER: I think probably I have shown that by other witnesses, but I didn't want to waive my point.

MR. WAYNE: Q. You were working under Witkouski, weren't you?

A. Yes.

Q. And he was your boss?

A. That was my opinion.

MR. PLUMMER: I move to strike the answer out.

THE COURT: Overruled.

MR. WAYNE: Q. How long had you been working on this hoist?

A. I worked at the old shaft. The hoist was transferred, the same hoist.

Q. Mr. Egbert, that hoist was brought down to the new shaft, as you call it, about the early part of March, 1916, was it not?

A. I believe so.

Q. Now, that hoist consists of a spool or drum, on which a cable is coiled, does it not? It has a spool or drum, on which the cable is coiled?

A. Yes, that's right.

Q. And on the end of the spool or drum there is what is called a band clutch, is there not?

A. Yes, sir.

Q. And that band clutch was at this time lined with asbestos, wasn't it?

A. Yes, it was lined with belting or asbestos, I am not sure which.

Q. The purpose of that clutch is to transmit the power of the engine to the drum, isn't it?

A. Yes, sir.

Q. By tightening on the drum it causes the drum to revolve one way or the other?

A. Yes.

Q. And in addition to that you have a brake, do you not?

A. Yes, sir.

Q. The clutch and the brake control the action of the hoist, do they not?

A. Yes, sir.

MR. WAYNE: Will you mark this please?

(Three certain photographs were marked as DEFENDANT'S EXHIBITS No. 5, 6, and 7.)

Q. Mr. Egbert, showing you Defendant's Exhibit



No. 5, that correctly illustrates the position of the man at the hoist, and shows the hoist, does it not?

A. Yes, sir. The reverse is transferred; the reverse was higher up.

Q. It was higher up?

A. Yes, sir.

Q. And by the reverse you mean the reverse lever?

A. Yes, sir, that is what we call it, reverse lever.

Q. That is the brake lever, is it not (indicating)?

A. Yes.

Q. Showing you Defendant's Exhibit No. 6, and directing your attention to the arrow, that shows the cam shaft, which is turned by pulling the clutch lever, does it not?

A. Yes, sir.

Q. And showing you Exhibit No. 7, that shows you the clutch as it is thrown in by the pulling of the clutch lever and the turning of the cam shaft?

A. Yes, sir.

Q. And the clutch band that you refer to is the band of spring steel, isn't it?

A. Yes, sir.

Q. Which extends almost entirely around the end of the drum, that is a fact, isn't it?

A. Yes, sir.

Q. And that is the part that you say was lined with either belting or asbestos?

A. Yes, sir.

Q. And as you pull the clutch lever it brings the two knuckles on the end of the band together, and tightens the clutch band on the drum?

A. Yes, sir.

Q. That is the action of it?

A. Yes, sir.

Q. And the entire control of the clutch was in that one lever which you operated with your right hand?

A. Yes, sir.

Q. And the brake lever you operated with your left hand?

A. The lever was operated, both with the right hand. The left hand was only for the air lever and the reverse lever.

Q. This was a hoist that was run by means of compressed air, wasn't it?

A. Yes, sir.

Q. And you operated the levers which controlled the air with your left hand?

A. Yes, sir.

Q. Do you know what caused the clutch to be loose on the day of the accident?

MR. PLUMMER: We object to that as not proper cross examination. I haven't asked him anything about the cause of it. I asked him what actually existed. I didn't attempt to prove by this witness, either as an expert or the man in charge of that hoist, what was the cause of it. I expect to show it by other witnesses.

MR. WAYNE: If the Court please, he can't put a witness on to testify to a condition, and then prevent me from cross examining him as to how that condition happened to exist.

MR. PLUMMER: I think we can.

THE COURT: I will permit you to ask him how he knew that the clutch didn't work well. That in all probability will lead to the same result. You certainly would have a right to go that far.

MR. PLUMMER: Yes. I have no objection to that question.

MR. WAYNE: Q. Mr. Egbert, what was the other shift doing when you went on work that night?

A. When we came on shift they was recoiling the cable.

Q. And what was the custom when the men were re-coiling the cable, as to whether or not they would loosen the clutch?

MR. PLUMMER: We object to any custom, if Your Honor please. It doesn't prove any fact here.

THE COURT: Well, I assume that counsel is getting at this question as to how he knows that the clutch didn't work well.

MR. PLUMMER: Well, I think he ought to ask him that then.

THE COURT: The objection is overruled. If I find that counsel is going outside of that ruling I will strike it out, and not permit him to go further with the interrogation.

MR. WAYNE: Q. What was the custom when they were re-coiling the cable, in regard to whether or not they would loosen the clutch?

A. They loosen the clutch on account of the cable easier off. If that was up on top, if the bucket and cable was down in, certain the weight of the bucket and cable was helping it out.

Q. But if you were trying to uncoil the cable off of the drum, without loosening the clutch, it would take quite a force of men to do it, would it not?

A. Pull pretty hard.

Q. But by loosening the clutch, it removed that friction from the end of the drum, and it could be pulled off readily?

A. Yes, sir.

Q. Now, Mr. Egbert, can you show me the screw which would be loosened to release the clutch? Just tell the jury what kind of a screw that was.

THE COURT: Let him show it to the jury on the picture here.

MR. WAYNE: I think I will have him mark that.

Q. Will you just put an X on that screw?

(Witness did so.)

Q. That is the screw which would be loosened to release the clutch, that you have marked with the X, at the top of the photograph, Exhibit 7?

A. Yes.

Q. Now just tell the jury how large a screw that was, and what kind of a screw.

A. If I am not mistaken, it was one inch.

THE COURT: An inch in diameter?

MR. WAYNE: Q. An inch through?

A. The bolt was—that is another bolt. That was changed. When I was on the hoist it was a six-cornered bolt here, and it is a four-cornered.

Q. Now, Mr. Egbert, do you mean to say that that bolt was one inch in diameter, one inch through?

A. The screw was that large, the diameter was



possibly an inch and a half, of that bolt there. I couldn't say for sure how big it was. I never measured it.

Q. The nut on the end of it, how large was that?

A. You mean that nut there (indicating)?

Q. Yes.

A. That was inch and a half, and I believe the bolt was one inch.

Q. And you would loosen it with a wrench, would you?

A. With a wrench or with a chisel.

Q. What was the condition of that screw or bolt after the accident?

A. I couldn't tell you. We went away.

Q. You went away?

A. Yes.

Q. Do you know whether or not it had been loosened?

A. Nobody say anything to me, you see.

Q. Who was the hoist man who preceded you?

A. Mr. Lytton.

Q. And he said nothing to you about it?

A. He reported nothing to me.

Q. And who is the pusher of the shift crew ahead of you?

A. Mr. Jacobson.

Q. Did he tell you anything about it?

A. No, sir.

Q. Now, the reason that the hoist descended rapidly was the fact that the clutch was loosened, was it not?



A. That is what it was.

Q. What gave you notice of the fact that it was going down too fast?

A. I saw the cable coiling very fast.

Q. And then you applied your brake?

A. Yes, sir.

Q. And did you have any trouble in stopping the hoist by means of the brake?

A. Well, I stopped it gradually. I was afraid to stop it quick.

Q. And you had no trouble in stopping it gradually?

A. I stopped it about 150 feet from the bottom.

Q. And the entire shaft was about 300 feet deep at that time?

A. I believe it was over 300,—64 or 66 sets.

Q. Will you tell the jury whether or not the clutch was in good condition at the time of this accident?

MR. PLUMMER: We object to that as not cross examination. I didn't ask him anything about the clutch, except the slipping of it. Good condition also calls for an opinion, and doesn't mean anything to the jury.

THE COURT: No. That goes directly to the question as to whether or not the clutch did hold, and why it didn't hold.

MR. PLUMMER: Good condition, he wouldn't know what he meant by that.

THE COURT: What do you mean by good condition?

MR. WAYNE: So far as its condition generally was concerned, aside from this looseness.

MR. PLUMMER: I haven't asked him anything about it. That isn't cross examination.

MR. WAYNE: You have asked him if it slipped, and I want to know why it slipped. I haven't asked him aside from the slipping of it.

THE COURT: He is really asking him now why it slipped. I think the question is rather general.

MR. WAYNE: Q. Mr. Egbert, will you tell the jury whether or not that clutch was in good working condition at the time of this accident?

MR. PLUMMER: I object to that. That is the very question the jury is to decide, and I think he ought to state the facts and let them decide.

A. My opinion was that it was in good condition.

Q. And what was the condition of the brake?

A. My opinion, it was O. K.

Q. You had no trouble with the brakes?

A. I never had trouble with the hoist.

Q. You had operated the hoist up at the other shaft, had you?

A. The same hoist.

Q. How much of a load was it pulling up there?

A. It was four or five times bigger haul.

Q. They were pulling a cage and a skip?

A. Yes, sir, and ore.

Q. Loaded with ore?

A. Yes, sir.

Q. What did the bucket have in it at the time of the accident?

MR. PLUMMER: I object to that as not cross examination. I didn't ask him anything about that.

THE COURT: Sustained.

MR. WAYNE: That is all.

RE-DIRECT EXAMINATION by

MR. PLUMMER:

Q. How long before this accident was it that you used this hoist up at the other shaft?

A. That was three weeks off.

Q. How long had you been using the hoist at this particular place where the accident occurred?

A. Pretty near two months, one or two days less.

Q. Then you had been using it two months since it was moved from the other shaft?

A. Yes, sir.

Q. It had been in use constantly, had it?

A. Yes, sir.

Q. You say, answering a question of Mr. Wayne, you made the remark that the hoist was in good condition. Do you mean by that, outside of this clutch?

A. It was my opinion it was in good condition.

Q. Did you consider the clutch in good condition?

A. In my opinion.

Q. When it was loose?

A. When it was loose we tighten it up.

Q. I mean before you tightened it up?

A. In my opinion it was all right.

Q. Even if it was loose?

A. It was loose and we fixed it up.

Q. But when it was loose, and before it was fixed up, did you consider it all right then?

A. Well, it was only the work of a couple of minutes to fix it.

Q. I didn't ask you that. When it was still loose—

MR. WAYNE: I object to that.

THE COURT: I think the opinion of the witness is clear, Mr. Plummer, that the clutch was in good condition with the exception that it wasn't tight. I think the jury must so understand it. No other construction could be put upon his testimony.

MR. PLUMMER: Q. Do you know what caused the clutch to get loose?

A. I have got two opinions about it.

Q. I asked you first as to whether or not you knew. You can answer that yes or no. Do you know what caused the clutch to get loose?

A. That is what I am trying to tell you.

Q. Answer that yes or no.

MR. WAYNE: If Your Honor please, I don't think he should cross examine his own witness.

MR. PLUMMER: I want him to answer my question, is all.

THE COURT: Do you know, Mr. Egbert, of your own knowledge, what caused this clutch to get loose? You say it was loose. Do you know why it got loose?

A. I heard two or three days after this—

THE COURT: That is what you heard?

A. Yes.

THE COURT: But you didn't see anyone loosen it?

A. No I didn't see nothing, and it was reported to me.



MR. PLUMMER: Q. You testified on cross examination about some custom of "they." You used the word "they" loosened the clutch to uncoil it, or something about coiling it, you was asked about a custom. On this particular occasion did you see anybody loosen it at all?

A. No, sir.

Q. And another feature that I didn't go into on my original examination, and I would like to now. After the accident occurred, and you finally got the hoist stopped, did you raise the bucket again to the surface, after that?

A. No, sir; I let it down to the bottom.

Q. You let it down to the bottom?

A. I got two bells.

Q. You lowered it down to the bottom?

A. Yes, sir.

Q. And then you raised it up to the top?

A. Yes, sir.

Q. And then what did you do, if anything, about tightening that clutch?

A. Well, I took a wrench and tightened it.

Q. Then it worked all right, did it?

A. Well, we went home after that. I made only two trips from below up. I couldn't tell how it worked afterwards. I never worked on that hoist no more.

Q. Before this accident occurred, did you ever know of this clutch slipping in the same manner as it slipped this day, before?

A. Not letting down, only hoisting up, once when



loaded, and once when started to hoist it, went back.

Q. How long was that before the accident.

A. It was about one month before.

Q. Both occurrences?

A. Pretty close.

Q. Those were the only two times you knew it to slip?

A. Yes.

Q. I will ask you, Mr. Egbert, to state whether or not, when you went to work on this shift, you took the hoist in exactly the same condition it was when it was left by the other, previous shift?

A. We came on shift—

Q. Please answer my question. You relieved Mr. Lytton, did you?

A. Yes, sir.

Q. And did he turn it over to you?

A. Yes, sir.

Q. You took it just as he left it, did you?

A. Yes, sir.

MR. PLUMMER: That is all.

RE-CROSS EXAMINATION by

MR. WAYNE:

Q. Mr. Egbert, all it needed then to make the clutch work perfectly was to tighten that one nut?

A. Yes, sir.

Q. Do you know whether or not that nut had been loosened by the preceding crew, so as to uncoil the cable?

MR. PLUMMER: Just a moment. He has testified that he didn't see anybody at all loosen it, and he wasn't there.

MR. WAYNE: To see things isn't the only way a man can know.

MR. PLUMMER: He can know by hearsay.

The COURT: The objection is sustained.

MR. WAYNE: Q. Did you tighten that nut before raising the men from the bottom?

A. Not the first time,—the second time.

Q. And even without tightening the nut you had no trouble in raising them from the bottom of the shaft?

A. Not the first time. The second time I have five men in, and I tried to raise it up and I couldn't raise it.

Q. Mr. Egbert, you spoke of the clutch slipping before. That is quite usual when you have a load on, is it not, in one of these hoists?

MR. PLUMMER: We object to that. They can't establish a degree of reasonable care by showing that they used a defective hoist at other times.

THE COURT: Overruled.

MR. WAYNE: Go ahead, Mr. Egbert.

THE COURT: That is, I assume that counsel is trying to show that it doesn't indicate a defect, that a clutch slips. Ordinarily that is one of the purposes of a clutch, isn't it, to have it so that it would slip?

MR. PLUMMER: It wouldn't clutch if it slipped, I mean slipped enough so as to let the whole cable down into the shaft.

THE COURT: That is one of the purposes of the ordinary clutch, isn't it?

MR. PLUMMER: I think not, if Your Honor please. My understanding of a clutch—

MR. WAYNE: I object to that.

THE COURT: I think his mechanical experience is different from mine.

MR. PLUMMER: My idea is that by reason of the friction which is forced against the drum, it turns the drum with the part it is attached to, and the very object of a clutch is to force it so that it will turn the other, and not slip. It may slip an inch or two, but it wouldn't be perceptible. If the clutch slips, then there is no power being transmitted.

THE COURT: That is true, but in connecting up the two parts of the mechanism the purpose of the clutch is to permit a slipping for the time being, so as not to jar and put a strain upon the transmission.

MR. PLUMMER: Until it takes hold, sure.

THE COURT: That is ordinarily true in automobiles, and you may apply the clutch in such a way that it won't slip at all, or apply it so that it will slip in part, and simply act as a brake. That is true sometimes. I am saying that only to indicate why I rule upon this question as I do. I assume that counsel is trying to bring out the fact that it doesn't necessarily mean that a clutch is defective because it slips. Whether that is true of this clutch or not I don't know, and will permit the witness to advise us upon the point.

MR. WAYNE: Mr. Egbert, it is not unusual for these clutches to slip some, is it?

A. It happens once in a while.

Q. On any hoist?

A. Yes, sir.

Q. And as a matter of fact, in lowering down a load you loosen the clutch somewhat with the clutch lever, do you not—you don't keep it tight?

A. You loosen it wide open.

Q. And control the lowering of the men—

A. Not lowering the men. In case you lower a bucket you open the clutch wide open and let it drop.

Q. And when you are lowering men do you keep it perfectly tight?

A. Perfectly tight.

Q. And it is not unusual, even when you have it tight, for it to slip a short distance, is it?

A. Well, if it is overloaded or anything like that.

Q. Now the only thing that is necessary to make that clutch act perfectly after the accident was to tighten that screw?

A. That is all.

THE COURT: He has answered that.

MR. WAYNE: Q. And the screw, from what you saw there, had been loosened by someone?

A. I couldn't tell. It was loosened very little. I couldn't tell from seeing it.

Q. I may have asked you this before, but at the time you went on shift that night the work of re-coiling the cable had not been completed, had it?

A. No. We put on three or four coils.

Q. How did you find out that the work hadn't been completed?

A. Well, the other crew was at work doing it.

Q. They were at work doing it?

A. Yes, sir.

MR. WAYNE: That is all.



RE-DIRECT EXAMINATION by

MR. PLUMMER:

Q. Did you ever know before of a clutch to slip as much as this clutch slipped on the occasion when this man was killed, so as to drop that down a hundred and fifty feet?

MR. WAYNE: Just a moment. He didn't say it was 150 feet. He said to within 150 feet of the bottom.

THE COURT: He may ask him if he ever knew of one to drop this far.

A. Many times.

MR. PLUMMER: Q. Where?

A. Three years ago, in the Standard mine.

Q. Did you ever, in this mine?

A. Not in this mine.

Q. Nor with this hoist?

A. Not with this hoist.

Q. You spoke something about when you raised the men up, you started to raise the same men up that you had lowered down?

A. Yes, sir.

Q. Including the man who was killed?

A. Yes.

Q. Why couldn't you do it?

A. The clutch was not tight.

Q. And before you could raise it up at all you had to let some of the men get off and lighten the load?

A. I tried to raise it, and can not do it, and I take the chisel and tighten it up.



Q. And then you was able to raise it?

A. Yes, sir.

MR. PLUMMER: That is all.

MR. WAYNE: That is all.

AL RENGQUIST, produced as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION by

MR. PLUMMER:

Q. You may state your name.

A. Al Rengquist.

Q. Where do you live?

A. Butte, Montana.

Q. Were you working for the defendant company at the time the deceased here was killed?

A. I was.

Q. In what capacity?

A. Night foreman.

Q. I wish you would describe as briefly as you can the different grades of bosses there, or foremen. What does the night foreman have charge of?

A. The whole mine at night.

Q. And the day foreman has charge of the whole mine in the day time?

A. Has charge of it all the time.

Q. Who was under you with reference to this particular work?

A. The stope bosses and pushers and all the rest of the men on the night shift.

Q. What is a pusher?

A. A man working in a shaft—he had men in the shaft.

Q. Working with the rest of the men?

A. Yes.

Q. What does the pusher do,—push the men on the work?

A. He sees that the work goes along and looks after things there.

Q. What is the fact with reference to that time when Mr. Witkouski was killed, whether or not under your direction and the direction of the day foreman, the work was being crowded under the superintendent's direction, pushed along as fast as you could?

MR. WAYNE: We object to that as immaterial.

MR. PLUMMER: They tried to show that our man was crowding the work, and we want to show that they were crowding him too.

MR. WAYNE: There is no charge of negligence based upon any such fact as that. I object to it as immaterial.

MR. PLUMMER: The charge of contributory negligence is general, and I don't know what they are going to try to prove.

THE COURT: The objection is sustained.

MR. PLUMMER: Q. These hoists that are in question here, doing the hoisting in that mine, including the hoist in question here, who has charge of those hoists, as far as keeping the hoists in repair are concerned?

A. The master mechanic and the engineers.

Q. What do you mean by the word "engineers"—the hoist men?

A. The hoist men, yes.

Q. State whether or not Witkowski had anything to do with that feature of it?

A. The only knowledge I had was that the engineer and master mechanic was the ones that looks after the hoist.

Q. What was Mr. Witkowski's exclusive duties?

A. Pushing the shaft, working in the shaft.

MR. PLUMMER: You may cross examine.

CROSS EXAMINATION by

MR. WAYNE:

Q. How many shifts were working in this shaft at that time, Mr. Rengquist?

A. Three eight hour shifts.

Q. And of what did each of those shifts consist?

A. There was an engineer, pusher, and three men.

Q. And they were all under the general direction, so far as doing their work was concerned, of the pusher, weren't they?

A. Well, yes, they were under the pusher's orders.

Q. The pusher told the hoist man when to lower and when to raise, didn't he?

A. Yes, by a bell signal.

Q. And the stuff that they were lowering was drills and machines and lagging, and material such as that?

A. Yes.

Q. And the stuff that they were bringing up from the shaft was ore and waste and the like of that?

A. Muck, principally, waste.

Q. Principally muck at that time?

A. Yes.

Q. And the reason that it was principally muck was that this was a shaft which was in process of being sunk, that is the fact, isn't it?

A. Yes.

Q. And it had not yet been used as a working shaft?

A. No.

Q. Now, when you say that the making of repairs on the shaft was in the hands of the master mechanic or the hoist man, you mean the repairing of any defects, do you not?

A. In the hoist, yes.

Q. If a bolt was loose or a nut was loose, it was not the business of the master mechanic to come and tighten that, was it?

A. Well, the engineer was supposed to do that.

Q. He was supposed to look out for little things of that sort?

A. He could tighten up a nut all right enough.

Q. It was only the business of the master mechanic to repair the hoist when there was some part broken, isn't that what you mean to say?

A. Yes, he would repair broken parts and change parts in it, whatever was needed, I think.

Q. What system of inspecting did they have up there at that time, of the machinery?

A. Well, if the hoist, if anything went wrong they usually notified the master mechanic or McDonald.

Q. Who would notify him?

A. The engineer.

Q. And isn't it a fact that the master mechanic or his assistant inspected the hoists and other machinery, the pumps, about once every twenty-four hours?

MR. PLUMMER: If your Honor please, I submit that isn't cross examination, as to what was done. I asked this witness simply the offices of the different employes, as to what they were required to do, as between Mr. Witkowski and the engineer and the master mechanic.

THE COURT: Sustained.

MR. WAYNE: That is all.

RE-DIRECT EXAMINATION by

MR. PLUMMER:

Q. Who had the hiring and discharging of the engineer?

A. Well, McDonald, he hired the engineers, and if he wanted a man on the hoist he put him on the hoist.

Q. Who is McDonald?

A. Foreman McDonald.

Q. General foreman?

A. Yes, sir.

Q. Could Witkowski discharge the engineer?

A. He could recommend his discharge.

Q. In case he should recommend his discharge, who would he recommend it to?

A. Either McDonald or myself.

Q. State whether or not it was within your dis-



cretion either to discharge him or put him to work in some other place?

A. Well, if he couldn't fill his place there, as a rule, if we thought he was all right in a stope, we would put him in a stope.

Q. But you did that yourself?

A. Yes, sir, that was up to you.

Q. Witkouski didn't have anything to do with that?

A. No.

MR. PLUMMER: That is all.

RE-CROSS EXAMINATION by

MR. WAYNE:

Q. Did you ever know of a case where the pusher of a shift or of a shaft crew recommended a man for discharge and the shift boss or foreman refused to discharge him?

A. Well, we would say he didn't want that man, and you could put him in a stope.

Q. That is it, that was the custom. If Witkouski at any time said that he didn't want Egbert he would be discharged, wouldn't he?

A. Not necessarily discharged. He would be put in a stope.

Q. But he would be discharged from that job?

A. From that position, yes.

MR. WAYNE: That is all.

RE-DIRECT EXAMINATION by

MR. PLUMMER:

Q. Could Witkouski even discharge part of his own mucking crew?

A. He could—if he didn't want them there he could send them up to one of us.

Q. And you could do what you wanted to with them?

A. Yes.

MR. PLUMMER: That is all.

RE-CROSS EXAMINATION by

MR. WAYNE:

Q. And if he didn't want them you could what you men say, "send them down the hill"?

A. No.

MR. WAYNE: That is all.

MR. PLUMMER: That is all.

J. H. LYTTON, produced as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION by

MR. PLUMMER:

Q. What is your name?

A. J. H. Lytton.

Q. Where do you live?

A. I live at Gem, Idaho, at present.

Q. For whom are you working?

A. Myself.

Q. You are working for yourself?

A. Yes, sir.

Q. Were you working for this defendant company at the time this accident occurred to Mr. Witkowski?

A. Yes, sir.

Q. What shift was you on, as distinguished from the shift that he was on when he was injured?

A. They relieved our shift. Mr. Witkouski's shift relieved mine.

Q. What position did you hold with the shift you was with?

A. Hoist man.

Q. This same hoist?

A. Yes, sir.

Q. State whether or not you had charge of that hoist?

A. I did. I thought I did.

Q. Who was your boss, who was the boss of the—the pusher that come on the same shift you did?

A. Mr. Jacobson.

Q. Was that the same number of men?

A. Yes, sir.

Q. State whether or not Jacobson could discharge you?

A. Well, I never felt that he could. I was hired by the roreman, and the foreman gave me my orders, an' I felt that I was under the foreman, although in the way of work I listened to Mr. Jacobson, and whatever he said went with me, in the way of work.

Q. But with reference to taking care of the hoist?

A. I did that myself.

Q. Did Jacobson have anything to do with that?

A. No, sir.

Q. What was Jacobson's orders confined to, what part of the work was his orders to you confined to?

A. Well, anything in the way of the work. It didn't matter what it was. In case of hoisting or

lowering, if he happened to need anything, send it to him, anything of that sort.

Q. Things he wanted to use down below?

A. Yes.

Q. Who was your immediate superior officer that was immediately over you, with reference to handling and taking care of the hoist?

A. Mr. Hughes.

Q. What office did he hold?

A. He was the master mechanic.

Q. State whether or not he had charge of the mechanical appliances of the mine?

A. That was my understanding, yes, sir.

Q. Including this hoist?

A. Yes, sir.

MR. WAYNE: If Your Honor please, unless the witness knows I don't think he should answer what his understanding is.

THE COURT: Well, he has already answered. You can cross examine him later.

MR. PLUMMER: Q. What was the condition of this hoist with reference to the clutch being loose, or any condition of the clutch, when you left it and turned it over to Mr. Egbert?

A. The clutch was loose. I had loosened it when we started to unwind this cable.

Q. Was it necessary for you to loosen it?

A. On account of the loosening of the drum so that we could pull the cable off the drum.

Q. Why did you have to loosen it? Why was it necessary to loosen it?

A. The drum shaft was sprung on the hoist, and by running with the clutch close enough to pull the weight, the load it had to pull, it would come around and catch, and would connect you with the engine when your clutch was throwed out, and therefore you would have to pull the whole engine to unwind this cable, and to release that we would loosen this clutch bolt.

Q. If it hadn't been sprung would you have had to loosen it?

MR. WAYNE: I object to that as leading.

THE COURT: Overruled.

MR. PLUMMER: Q. Would you have had to loosen it if it hadn't been sprung?

A. No. If the clutch had been in proper shape we wouldn't, no, sir.

Q. That is what I mean. Who told you to loosen it?

A. Mr. Hughes.

Q. Did he ever loosen it himself?

A. No. He had me to. He come on the first time that we unwound this cable, and it was in my shift, and he come in and told me to loosen the clutch, and I did so.

Q. I wish you would go ahead and describe now any other conditions of that hoist that was loose, which would cause the drum to revolve around, or cause the clutch to slip, or have any relation to the slipping of the clutch at all.

A. Well, the first thing, the clutch shaft—you see there was an arm worked on the bottom of that



shaft, and then up here at the top there was one that throwed this clutch in and out, and the connection was loose in both of those. The rod that connected this lever to this shaft, you had to watch that or the nut would work off of that all the time, you would have to keep watch on those things, to keep them from dropping off, which we did, and also the key in the collar of the clutch was loose, and we would have to tighten that up all the time.

Q. How did that condition affect the looseness of the clutch?

A. You had so much lost motion there, was all. That was why we had to run this clutch so close, there was so much lost motion that in throwing your lever either way it wouldn't open your clutch band wide enough. If the thing had been tight it would have given more space between the clutch band, so that you wouldn't have lost this motion, you see, and by having that loose, that caused us to run this band so close, and then whenever we would go to throw the clutch out it would run so close we would pick up the engine where this shaft was sprung; every time it come to a certain place, every revolution it made, it would pick up the engine.

Q. Could the hoist have been repaired or fixed so as to obviate the necessity of loosening this?

A. Yes, I think so.

Q. Just state how.

MR. WAYNE: I object to what the witness thinks.

A. Well, yes, it could.

MR. PLUMMER: Q. Just state how, and what was necessary to be done.

A. By putting in new keys in this place it would have stopped all that, keys to fit.

Q. And what was the condition of the drum itself, with reference to the unevenness of it, or if there was any bunches on it, or unevenness, just tell that.

MR. WAYNE: I object to that. There is no charge that there was anything wrong about the drum or the cable.

MR. PLUMMER: We say generally that the whole hoist was out of order.

THE COURT: The objection is sustained. You said generally it was out of order, and then you specified the particulars.

MR. PLUMMER: I thought the charge was so general that it would cover any defect in it.

THE COURT: You might call my attention to it. In reading the complaint, I thought you specified certain particulars that you relied upon.

MR. PLUMMER: No, we haven't.

MR. WAYNE: They specify them in paragraph 12, if Your Honor please.

MR. PLUMMER: My only object is not for the purpose of proving a defect in the drum itself, but simply I want to show what would be the effect on the bucket from the cable going over this, if there was a lump on there, cause it to jerk, and thereby cause it to accelerate the speed, and prevent it from being held to some extent.

THE COURT: The objection is sustained.

MR. PLUMMER: An exception.

Q. I wish you would describe, Mr. Lytton, just how you operated that hoist with reference to lowering men down. What was the custom there all the time you were there, not only with this hoist, but all the hoists in the mine that you knew anything about, what you did in lowering the men, so as to retard going down just as fast as you wanted to?

A. Well, we threw in our clutch, and then we opened our air release, and started the men down. When I opened this air release I always held them with the brake until I opened the release, and then slowed up with the brake, and then I aimed to put them down about a certain speed all the way, and regulated that with the brake.

Q. That is when you go down gradually.

A. Yes.

Q. The lowering of the men was done by the operation of the engine itself, and the compression of the engine?

A. Yes, sir, the engine compressed its own air, and it traveled just the same down as it would up. You would have to give it the air to come up. It made its own air going down.

Q. In case this clutch was loose, would your engine have any retarding effect at all when you tried to lower the men down?

A. No, sir, not if the clutch was loose.

Q. How long would it take you before you could apply the emergency brakes if you found the engine wouldn't hold it?

A. In an instant.

Q. In the meantime it could have dropped some number of feet?

MR. WAYNE: That is leading.

MR. PLUMMER: Q. How far could it have dropped before you could have stopped it?

A. Well, if a man is looking what he is doing he will never let it drop no distance.

Q. Providing he can do it quick enough?

A. Well, you can work—you have always got a firm pressure with your brake all the time.

Q. If you didn't anticipate it you wouldn't be prepared would you?

A. The chances are that bucket may drop ten feet with you before you would realize just what happened.

MR. PLUMMER: I think that is all.

CROSS EXAMINATION by

MR. WAYNE:

Q. Mr. Lytton, you worked on Jonas Jacobson's shift or crew?

A. Yes, sir.

Q. And there were five of you on that crew?

A. Yes, sir.

Q. You all worked under the general direction of Jacobson?

A. Yes, sir.

Q. Now that particular day, the latter part of your shift, you had been uncoiling and coiling this cable upon the drum, had you not?

A. Re-winding, yes, sir.



Q. It was customary when you went to unwind the cable to loosen the clutch, was it not?

A. Yes, sir.

Q. And you loosened the clutch by taking a wrench and loosening that bolt at the top?

A. Yes, sir, loosening the nut on the bolt.

Q. And you did that on this day?

A. Yes, sir.

Q. And as long as the clutch was in there would be some friction to pull against when you uncoiled or unwound the cable, wouldn't there?

A. Well, as long as the clutch is in you would have to pull the whole engine. It wouldn't slip as long as your clutch was in. You would have to back your whole engine to unwind.

Q. And on any hoist you ordinarily will loosen the clutch before you unwind the cable?

A. No; if the hoist is working as it should work, all you have to do is to throw your clutch out, and that releases the drum.

Q. Does it release it entirely?

A. Yes, sir, it should release it entirely, if it is working right.

Q. When you went off shift that day the job of re-coiling the cable had not been completed?

A. No, sir.

Q. Do you know of its having been rewound at any time on Witkouski's shift?

A. Yes, I remember of one time, of its being rewound on his shift.

Q. And it was always customary to loosen that clutch to do that?



A. Yes, sir, it was.

Q. Did Witkouski know of that fact?

A. I suppose so. I couldn't tell you whether he did or not.

Q. Now on that particular day did you tell Ebbert—

A. No, sir.

Q. —that you had loosened the clutch?

A. No, sir.

Q. And as a matter of fact if you had tightened that bolt at the top when you went off shift the clutch would work, wouldn't it?

A. Yes, sir.

Q. And in lowering men you controlled the hoist, the drum, by either the clutch or the brake, or both?

A. Yes, sir, both, and the air also.

Q. And you say that if the bucket got away you could stop it by the application of the brake, in an instant?

A. If you didn't let it get too much start.

Q. Now then, in stopping it though, the proper way to do would be to apply the brake gradually, so as not to break the cable or jar the men off the bucket, wouldn't it?

A. Yes, sir.

Q. You wouldn't dare throw in your brake all of a sudden?

A. Well, no, it wouldn't be necessary.

Q. And it wouldn't be proper either, would it?

A. No, it wouldn't be proper or necessary to do either one.

Q. Now, Jacobson could have discharged you at any time he wanted to, couldn't he?

A. I never thought so.

Q. But you didn't know.

A. I didn't know.

Q. You always took his orders, took your orders from him, didn't you?

A. Yes, what he gave.

Q. You were all engaged in sinking that shaft?

A. No. I run the hoist.

Q. You were loading the muck up that the other men—

A. I was pulling the muck with the hoist that they sent up, yes.

Q. And you operated the hoist from signals given you by Jacobson?

A. Anybody that gave them. I accepted any signal that was given.

Q. The signals were given from the bottom of the shaft?

A. Yes, sir, as a rule. There was timber men also there, and they were working above the bottom.

Q. Mr. Lytton, irrespective of any condition which you say existed in that clutch, the bucket could still be controlled if the nut was tightened, couldn't it?

A. How is that?

(Last question read.)

A. If the nut was tightened?

Q. Yes, if the nut at the top, which you say you loosened.

A. The nut on the clutch bolt?

Q. Yes.

A. If it was tightened that would tighten the clutch, and then, of course, as long as your clutch was tight there was no chance for any accident of any kind.

Q. Then as a matter of fact, the fact of the matter is that this hoist dropped down because of the fact that nut had been loosened and not tightened afterwards?

A. Yes, sir, I think that was the cause of it.

Q. Do you know Mr. Gregory?

A. Yes, sir.

Q. He was working up there at the time, wasn't he?

A. Yes, sir.

Q. Did you tell Witkouski that you had loosened the nut?

A. No, sir, I didn't tell him that.

Q. Do you remember going to look at this hoist one or two days after the accident, with Mr. Gregory?

A. Yes, there certainly was something. I judge; I don't just remember, but it was a short time after, I think there was Mr. Gregory and Mrs. Witkouski's father, if I remember right.

Q. Now, at that time, I will ask you if you did not have the following conversation in substance and effect with Mr. Gregory: If it is not a fact that he asked you how this accident occurred, and you, going to this nut on the clutch bolt, told him that you had

loosened it; that he then asked you, "Did Witkowski know," or "Didn't you tell Witkowski?" And you said, "Why, yes, of course he knew, because I told him," or words to that effect?

MR. PLUMMER: We object to that as not cross examination.

THE COURT: Overruled. This is laying the ground for impeachment. The witness had stated that he didn't tell Witkowski that. Now counsel is seeking to show that he made a different statement at a different time.

MR. WAYNE: Q. Isn't that a fact?

A. I don't remember of making that remark.

Q. Do you want this jury to understand that you did not make any such remark?

A. I do not remember of making it.

Q. You don't know then whether you did or did not?

A. No, sir, I couldn't say positively, but I don't remember of making it.

MR. WAYNE: That is all.

RE-DIRECT EXAMINATION by

MR. PLUMMER:

Q. This clutch you speak of, what had been done to that clutch some time before this accident occurred, with reference to taking off anything and putting on something else?

A. Well, this was a new clutch that had been put on. They had taken the original clutch off, that belonged to the hoist, and put this new one on altogether.

Q. What material did they have on the old clutch as friction material?

A. That was wood blocks.

Q. What did they put on here when they changed it?

A. Why, just belting, I think, it looked to be. I never examined it close, but I think that is what it was.

Q. How long was that before the accident?

A. That was on the hoist when they set it up at the new shaft.

Q. The change was made before that, then?

A. Yes, the change was made before they set it there.

MR. PLUMMER: That is all.

RE-CROSS EXAMINATION by

MR. WAYNE:

Q. That clutch band that was replaced on the hoist at that time was considerably larger than the one that had been on up at the other place, wasn't it, or was it?

A. No, I don't believe it was. There couldn't have been much difference.

Q. The clutch band is circular, a circular band of spring steel, is it not?

A. I couldn't tell you whether it is spring steel, but it is of that nature, yes, sir; I couldn't say.

Q. How wide is that band?

A. That band is I should judge about three inches and a half or possibly four. I never did pay par-



ticular attention, but I judge somewhere in that neighborhood.

Q. About what was the diameter of the end of the drum where it fitted on, where it clutched? Sixteen or eighteen inches, wasn't it?

A. Yes, it was that much, something in that neighborhood, eighteen or twenty inches, possibly; I wouldn't be positive.

Q. Possibly twenty inches?

A. Yes, sir.

Q. So that it had a braking or clutching surface of something like 180 square inches, didn't it? If the diameter was twenty inches, the circumference would be about sixty, would it not?

A. Yes.

Q. And three inches wide?

A. It was good three inches wide. Yes, it had something like that, I think.

MR. WAYNE: That is all.

MR. PLUMMER: That is all. If the court please, I would like to ask Mr. Egbert a question about a matter I haven't asked him about before I put him on the stand. I haven't talked to him about it, and I would like to ask him a question about it.

THE COURT: We will take a ten minute recess, gentlemen.

(Ten minute recess.)

MR. PLUMMER: I will call Mr. Egbert for one question.

JOE EGBERT, heretofore duly sworn on behalf of plaintiff, upon being recalled, testified as follows:

DIRECT EXAMINATION by

MR. PLUMMER:

Q. Mr. Egbert, after you saw that the clutch was loose and there was no control over the lowering of the bucket through the medium of the engine, state whether or not you stopped the descent of the bucket as soon as you were able?

A. I tried my best to stop it gradually.

Q. You made the effort to stop it as soon as you could after you discovered that you had lost control?

A. Yes, sir.

Q. Just state why it was you wasn't able to stop it before you did?

MR. WAYNE: He has testified to that already.

MR. PLUMMER: No, he hasn't covered that point at all.

THE COURT: He may answer.

A. The weight in the bucket, in case the clutch slip, is very hard to stop, and I believe I done very well to stop the bucket in the distance, without any accident to the men in the bucket.

Q. How quick did it drop?

A. I couldn't tell you. I couldn't see the bucket.

Q. But you could tell from the cable?

A. It went very fast.

MR. PLUMMER: Take the witness.

CROSS EXAMINATION by

MR. WAYNE:

Q. You don't know how fast it went down?

A. I couldn't tell you.

Q. And you were able to control it with the brake just as soon as you saw that it was dropping?

A. Yes, sir.

MR. WAYNE: That is all.

MR. PLUMMER: That is all.

We will call Mr. Hare.

TOM HARE, produced as a witness for and on behalf of plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION by

MR. PLUMMER:

Q. State your name.

A. Tom Hare.

Q. Where do you reside?

A. Frisco, Idaho.

Q. What business are you in?

A. I was working outside at present.

Q. You are not working for this company now?

A. No, sir.

Q. Were you working for this company at the time of this accident?

A. No, sir.

Q. How long had it been that you had quit there before the accident?

A. I would judge about two weeks.

Q. And what were you doing, what work were you engaged in, at the time you quit?

A. Running this hoist.

Q. Running this same hoist?

A. Yes, sir.

Q. How long had you been running this hoist before you quit?

A. About a month.

Q. In this same shaft, was it?

A. The same shaft.

Q. Who was the pusher on the shift that you was running the hoist on?

MR. WAYNE: I don't think that is material. That was more than a month before this occurrence.

MR. PLUMMER: Q. How long did you say?

A. Not over two weeks, I don't think.

MR. PLUMMER: I thought counsel misunderstood him.

MR. WAYNE: Well, even two weeks.

MR. PLUMMER: We have a right to show the condition of the hoist for some time before that.

MR. WAYNE: I am not objecting to that.

THE COURT: He may answer.

A. Ole Hoke.

Q. State whether or not they were doing the same class of work described here, about sinking this shaft.

A. The same class of work.

Q. You were in charge of this same hoist, I believe you said?

A. Yes, sir.

Q. Did Hoke have anything to do with you, about giving you any directions or instructions about how to repair this hoist or keep it in shape or what to do with it?

A. None whatever.

Q. Who was you responsible to directly?

A. McDonald, the foreman of the mine.

Q. What member of the mechanical department, if any, had charge?



A. Mr. Hughes.

Q. What was his office?

A. Master mechanic.

Q. At the time you left there, two weeks before this accident occurred, I wish you would describe just what condition that hoist was in.

A. It was in very poor condition.

Q. What do you mean by very poor?

A. It was loose.

Q. How long have you been handling hoists and working in mines and doing work of this character?

A. Eighteen years.

Q. Did you consider that a reasonably safe hoist to use in an operation of that kind?

MR. WAYNE: I object to that as immaterial, and not one of the charges of negligence in the complaint.

MR. PLUMMER: I think it is.

THE COURT: Reasonably safe in what respect?

MR. PLUMMER: With reference to the condition of the clutch and the bolts. I will limit it. In regard to the bolts, lugs, that is, which fastened the clutch, or were connected with the clutch, and the way it was fastened to the drum, and also including the brake of the clutch, and all matters and things which directly affected the clutch and the operation of the clutch and the operation of the drum, did you consider it in a reasonably safe condition in the way in which it was at the time you left it?

A. No, sir.

MR. WAYNE: I object to that further because it calls for the opinion of the witness.



MR. PLUMMER: He certainly has had considerable experience, eighteen years of it.

MR. WAYNE: It is not open to the opinion of expert witnesses. Also no foundation for it. The testimony so far is confined to a clutch loosened by the act of one of the servants, done probably—

THE COURT: Do you promise to show that the clutch was in the same condition at the time of the accident as it was when this gentleman left the employ of the company?

MR. PLUMMER: Substantially, yes, sir, I think absolutely. I will withdraw that question temporarily and ask him the condition it was in, so as to compare.

Q. Just state what condition this hoist was in, with reference to these portions that I have spoken of, at the time you left it, two weeks before this accident occurred.

MR. WAYNE: The same objection to that.

THE COURT: Overruled.

A. It was loose, the keys were loose in the arms of the clutch.

THE COURT: The keys in the arms?

A. That connected the arms on to the clutch. There was three keys in that, three arms, connected with the shaft.

MR. PLUMMER: Q. What was the condition of the shaft that the drum was on?

MR. WAYNE: I object to that as not one of the grounds of negligence mentioned in the complaint.

THE COURT: Sustained.

MR. PLUMMER: It has been admitted without objection heretofore.

MR. WAYNE: No, it was ruled out upon objection.

MR. PLUMMER: It was ruled out with reference to the raised portions on the outside of the drum, but the court permitted Mr. Lytton to testify, where it wasn't objected to, that the shaft was sprung, and made it wobble.

MR. WAYNE: If Your Honor please, Mr. Lytton was speaking of the shaft, and the evidence was plain on the question, that he was speaking of that cam shaft at the bottom, that works the clutch, revolves and pushes in the clutch.

MR. PLUMMER: He described, if Your Honor please, the shaft that run through the drum, and showed how it was sprung and wobbled, and what effect it had on the clutch, and described why it was necessary to loosen the clutch.

MR. WAYNE: If Your Honor please, if there is any such testimony as that on the record I move at this time that it be stricken out, because it is not embraced within the complaint, or any act of negligence charged in the complaint.

MR. PLUMMER: We have to show the relation of the clutch to the drum, and show why it was necessary to loosen these bolts which he did loosen, in order to use it at all, and therefore it would mean—I have to show the connection between the falling and the condition of this hoist.

THE COURT: But that condition of the shaft is

not shown or claimed to have had anything to do with the failure of the clutch to operate.

MR. PLUMMER: I think Mr. Lytton so testified, if Your Honor please.

MR. WAYNE: Mr. Lytton said expressly that the only reason for it not working was the fact that he himself had loosened this one bolt.

MR. PLUMMER: And he said why he had to do it was because this thing was sprung and didn't fit.

THE COURT: Yes, that is true, but you are asking whether this was in a condition to operate. It made no difference in the operation of it whether this was sprung or not, when the clutch was properly adjusted. In other words, the only reference to that, or the only reason for making reference to it, was to explain why he loosened the clutch when they re-wound the cable.

MR. PLUMMER: That is correct. Why it was necessary to loosen. It shows the whole defective condition, relating directly to the cause of the dropping of this bucket.

THE COURT: I don't know what it has to do with this witness.

MR. PLUMMER: I am trying to show now the same condition the other witness has testified to, show whether or not that was a reasonably safe condition.

THE COURT: The objection is sustained.

MR. PLUMMER: Q. What relation did these loose keys that you speak of have to the clutch, with reference to the clutch being loose, or the necessity for loosening it?

MR. WAYNE: The same objection to that.

THE COURT: Overruled.

A. In the clutch—they had this relation, that they left that much lost motion in the clutch.

Q. Did you hear Mr Lytton's description of the condition of the hoist when he used it on this shaft preceding the accident?

A. Today?

Q. Yes.

A. Yes.

Q. I will ask you to state whether or not this hoist was or was not in substantially the same condition as he described, when you left it two weeks before this.

A. The same condition.

Q. Now I will ask you, based upon your experience in handling hoists in mines, state whether or not in your opinion this was a reasonably safe hoist to have used for the purposes for which it was used, at the time this accident occurred?

MR. WAYNE: We object to that as calling for an opinion of the witness upon a subject which is not the subject of expert testimony, and wouldn't be within the province of the jury to say if here, the description of its condition, whether or not it was reasonably safe. It is trespassing on the province of the jury.

THE COURT: Sustained.

MR. PLUMMER: Q. State whether or not, in your experience, it was customary in mines of this kind to operate a hoist in performing the kind of



work that was being performed here, as testified to heretofore, in the condition which this hoist was in when you left it?

MR. WAYNE: I object to that as incompetent, irrelevant, and immaterial.

MR. PLUMMER: A custom of other operators certainly would be a circumstance.

THE COURT: Sustained.

MR. PLUMMER: On the theory that we couldn't show what was the custom of other— ?

THE COURT: Yes, I think you can get at this much more directly. If there was any defective condition here the witness can state what that was, and what the effect of it would be, and then it is for the jury to say whether or not it was in a reasonably safe condition, mechanical condition.

MR. PLUMMER: Q. What effect did the condition of this clutch and this hoist that you have described have upon its operation and the manner of its operation?

A. It would have the effect that it wouldn't be safe to operate.

Q. I mean in what way, just describe that.

A. You mean describe the— ?

Q. Describe why it wouldn't be safe.

A. Those keys are liable to drop out at any time and disconnect the clutch from the drum.

MR. WAYNE: I object to that, and move that that answer be stricken. I apprehend that a screw which is still holding and in position after an accident cannot be blamed.



THE COURT: Let him finish his testimony, Mr. Wayne, and if this all there is to it you can move to strike it out later on. This is somewhat preliminary, I assume.

MR. PLUMMER: Q. I think you have described the effect of the looseness of these keys, I believe you have described that as causing lost motion. What effect does lost motion have on the clutch?

A. It wouldn't tighten the clutch, properly tighten it.

Q. Why was it necessary to loosen and tighten this bolt that has been described?

A. It was necessary to do that in order to revolve the drum on the shaft.

Q. State whether or not that necessity was due to these other conditions that you have described.

A. It was.

MR. PLUMMER: Take the witness.

CROSS EXAMINATION by

MR. WAYNE:

Q. The lugs and screws which held the clutch were all in position at the time you left there, were they not?

A. Yes.

Q. And they were all holding the clutch, were they not?

A. Partly holding it.

Q. And the clutch engaged the drum and held the drum and transmitted the power of the engine to the drum in the manner in which it was expected to do?

A. Yes, sir.

Q. And the only thing you had to do was, when you uncoiled or unwound the cable, you loosened the nut on the clutch bolt?

A. It wasn't necessary to do that.

Q. Well, you did it if you wanted to release the clutch, didn't you?

A. You would have to, in the condition the clutch was in.

Q. And on the other hand, when you were through unwinding the cable and winding it again, you could tighten that nut on the clutch bolt and it would hold?

A. It might.

Q. Well, it did, as a matter of fact, didn't it?

A. It did sometimes, I suppose.

Q. What is that?

A. It would for a while.

THE COURT: Did it while you were there?

A. No.

Q. Did it slip to any great extent?

A. When those keys got loose in the clutch it would slip.

Q. Then you would tighten up the screw again?

A. Didn't tighten any screws, no.

Q. How did you stop the slipping then?

A. Tighten the keys.

Q. And then it wouldn't slip?

A. Not much, no.

Q. In all of these small hoists that they are using in such work as that the clutch slips at different times, doesn't it?

A. I don't know if all of them do or not.

Q. The ones you have worked on do occasionally, don't they?

A. Very little.

MR. WAYNE: That is all.

RE-DIRECT EXAMINATION by

MR. PLUMMER:

Q. State whether or not you ever advised the master mechanic with reference to the condition of this hoist, and the danger of operating it.

A. I did.

MR. WAYNE: I object to that, if Your Honor please. There is no claim here that there was a notification of the defendant.

MR. PLUMMER: We don't need to claim it. It is a question of negligence.

THE COURT: Overruled.

MR. PLUMMER: Q. What did you say to him?

A. I pointed out its defects, those defects in the clutch to him.

Q. What did you tell him it would cause if they weren't fixed?

A. I told him it would cause—

MR. WAYNE: I object to that.

THE COURT: Sustained. It isn't a question of what opinion this witness had. If he called attention to the—

MR. PLUMMER: Q. Would the condition of this hoist as you have described it cause the operator to lose control of it?

MR. WAYNE: I object to that.

THE COURT: Sustained.

MR. PLUMMER: Q. What effect did it have upon the operation of it?

MR. WAYNE: The same objection.

THE COURT: What effect did what have?

MR. PLUMMER: The condition he has described, the loose keys, and the condition of the clutch. I asked him what effect they had on the ability of the hoist man to control the operation of the hoist.

MR. WAYNE: I object to that because it calls for the opinion and conclusion and conjecture of the witness.

THE COURT: It seems to me we have been over this in a way. It is very easy for this witness to answer this question in any way, and it would be almost impossible to know what he meant by it.

MR. PLUMMER: I will have him explain it then afterwards. I will have to ask the preliminary question first.

THE COURT: Very well. He may answer.

WITNESS: What was the question?

(Last question read.)

MR. PLUMMER: Q. And the control of the operator of the hoist.

THE COURT: That is, what effect did these conditions to which you have referred have upon the operation of this hoist while you were operating it, as a matter of fact, if they had any effect at all. It isn't a question of your opinion. It is a question of fact.

A. You were liable to lose control of it at any time.



THE COURT: The answer will be stricken out. Did you understand the question, witness? I impressed upon you that the question sought to elicit information as to what the effect was as a matter of fact, while you were handling the hoist; not your opinion as to what it was likely to be, or what might be, but did you have any trouble with it?

A. Yes.

THE COURT: State what it was.

A. I have had trouble with those keys getting loose.

THE COURT: The question is, whether you had any trouble in controlling the hoist and using it.

A. I had, controlling it, to start the bucket sometimes.

THE COURT: Proceed.

MR. PLUMMER: What kind of braking material was on this clutch?

A. It looked like common belting.

MR. PLUMMER: You may take the witness.

RE-CROSS EXAMINATION by

MR. WAYNE:

Q. As a matter of fact, you could always control this hoist with either the brake or the clutch, couldn't you?

A. Not with the clutch.

Q. Is it not a fact that when the nut on the clutch bolt was tightened, that you could control it with the clutch?

A. No.

Q. Mr. Lytton says the—



MR. PLUMMER: We object to what Mr. Lytton says.

THE COURT: Sustained.

MR. WAYNE: That is all.

MR. PLUMMER: That is all, Mr. Hare, I will call Mr. Jacobson.

JONAS JACOBSON, produced as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION by

MR. PLUMMER:

Q. You may state your name.

A. Jonas Jacobson.

Q. Were you one of the pushers we have referred to, working for the Interstate Company at the time this accident occurred?

A. Yes.

Q. What shift were you on, with reference to the shift that Mr. Witkouski was on?

A. Witkouski relieved me.

Q. What authority did you have, if any, as pusher, acting in the same capacity as Mr. Witkouski was, with reference to hiring and discharging the engineer running the hoist?

A. I didn't have any authority to discharge him. I had authority to tell him to go and see the foreman, if he didn't suit me.

Q. Who would you report to, as to him not suiting you?

A. To the foreman.

Q. And then the foreman did whatever he wanted to, did he?

A. Yes.

Q. Did you have any authority, or did you give any orders to the engineer about repairing or taking care of his hoist?

A. Not about the hoist.

Q. What was your orders confined to?

A. Well, it was confined to telling him—you mean the hoist man?

Q. Yes.

A. Well, if there was anything on the station to do, cut fuse, and so on, and caps, and do things like that, around the station, when he wasn't busy running the hoist.

Q. When you wanted to come up how did you signal him?

A. I would ring the bell for him.

Q. When you was on shift where was you all this time?

A. Mostly in the sump.

Q. You mean the bottom of the shaft?

A. The bottom of the shaft.

Q. Working with and directing the men you had down there?

A. Yes, sir.

MR. PLUMMER: That is all.

CROSS EXAMINATION by

MR. WAYNE:

Q. Mr. Jacobson, there were five men on each of these shaft crews, were there not?

A. Yes, sir.

Q. And the pusher was the boss of all of the men?

A. Yes, I was boss for the five of them, except the hoist man to a certain extent.

Q. The hoist man was engaged in lowering down supplies to you and in taking up the muck that you made?

A. Yes.

Q. And the other men were engaged in getting out muck from the bottom of the shaft?

A. Well, I was there too.

Q. And you told the hoist man when to pull up the bucket and when to lower it?

A. I rang the bell.

Q. And you gave him orders as to doing other chores and errands around the mine?

A. Not around the mine.

Q. Didn't you use to send him for fuse and powder?

A. No, sir.

Q. You didn't use to send your men. Do you know whether or not Witkouski did?

A. I do not.

Q. You wouldn't know?

A. No.

Q. You say that at any time when he didn't suit you, you could send him to the foreman?

A. Yes, sir.

Q. And he would then be discharged, would he not?

A. I don't know anything about that.

Q. But you would take him right off the job and send him to the foreman.

A. I couldn't take him off the job. I could tell him to go and see the foreman when he went off shift.

Q. Mr. Jacobson, you were on the shift before Witkouski came on?

A. Yes.

MR. WAYNE: That is all.

MR. PLUMMER: That is all, Mr. Jacobson.

J. O. GELLICE, produced as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION by

MR. PLUMMER:

Q. State your name.

A. J. O. Gellice.

Q. Where do you reside?

A. Spokane, Washington.

Q. How long, how many years, if at all, have you been engaged in mining and the operation of mines, as superintendent and mining engineer and master mechanic, general foreman, and all of those positions of authority, in and about mines of the character of the Interstate-Callahan, if you know the character of that mine, including the Coeur d'Alenes?

A. Twenty years last March.

Q. Just state what experience you have had in those capacities that I speak of, which had to do with the operation of machinery, such as hoists and appliances of that kind.

A. In other words, a service record over that period of time?

Q. Well, just in a general way. I just want to

show your experience, to see whether or not you are qualified.

A. My experience extends from Leadville, Colorado, from there to the Butte camp.

Q. Just tell what companies.

A. I was with the Little Johnny mine in Leadville, Colorado, in 1896.

Q. In what capacity there?

A. On a hammer, miner's pay.

Q. Then what?

A. In the spring of 1897 I went to Butte and worked in the Raris shaft in Butte in 1897; and in the fall of 1897 I came from there to the Coeur d'Alenes, and was employed by the Bunker Hill, and stayed with them that winter, leaving the following spring, and went into the employ of the Frisco Company, which company I was with for something over two years, running hoists and mining. I was contracting there as well when I first went there. I ran the first motion (?) hoist at the Frisco mine for something over a year.

Q. What positions have you held as general foreman and as master mechanic, and for how many years during that period?

A. From that point I went in charge of the sample works jointly with Mr. Clagget for a year and a half, during the administration of the Mine Owners Association in the Coeur d'Alenes. At that point I joined the Allis-Chalmers Company as construction engineer for them.

Q. What kind of machinery?



A. Mining Machinery. I was with them and the engineering department of the Brady Company and the Allis-Chalmers for a period of something over two years. Afterwards, in British Columbia, I was district manager for that company, and joined the Bagdad-Chase Company, operating in California and Idaho.

Q. What kind of operations?

A. In mining in general. From that point I went with the Inspiration Copper Company of Globe, Arizona, as general superintendent there.

Q. How large a mine is that?

A. Employing about 1500 men, or thereabouts.

Q. What was you doing?

A. General superintendent during the summer of 1910.

Q. Did you have charge of and oversee the operation of the hoists, of the kind that have been described here?

A. I have at all times, yes, in my operations.

Q. Have you seen these photographs that have been offered here?

A. I have.

Q. Have you heard the description by the witnesses as to the condition of this hoist at the time this accident occurred?

A. I have.

Q. I wish you would describe what was the effect on that hoist and those operations, from the conditions which they have described as existing with reference to the clutch and the keys and bolts.

MR. WAYNE: Just a moment. If Your Honor please, I object to that as incompetent, irrelevant, and immaterial, not being a matter that can be testified to by experts, but being the subject of ordinary testimony. The witnesses have already testified to this. This man apparently has never seen that hoist.

MR. PLUMMER: He has seen pictures of it. It certainly couldn't be claimed that a witness wouldn't be competent because he never happened to see a particular hoist.

MR. WAYNE: This isn't the subject of expert testimony, if Your Honor please. He is simply going to give his opinion now as to what would be the result of these different things that have been testified to.

MR. PLUMMER: Certainly.

MR. WAYNE: It is incompetent and irrelevant.

THE COURT: I think I shall sustain the objection to this general question. Now, if you desire to make a record, Mr. Plummer, you make direct his attention to some particular thing, in the way of a hypothetical question, and then I will determine whether or not I will let him testify.

MR. PLUMMER: Q. This hoist that you see these photographs of, assuming that it was, on account of loose keys and the condition of the clutch that has been testified to here, what effect would that have upon the control of that hoist by the operator of it?

THE COURT: That is conceded, isn't it?

MR. PLUMMER: I don't know.

THE COURT: It was disabled as it was just at that time. I understand that they concede that in the condition in which it was at the time of the accident the clutch would not control it.

MR. WAYNE: We concede, if Your Honor please, that that was the purpose of the clutch, and of course if they go and by some act loosen the clutch—

MR. PLUMMER: Who do you mean by “they”?

MR. WAYNE: The evidence is in as to who did it.

THE COURT: You mean if anybody does?

MR. WAYNE: Yes, if anybody does. It doesn't make any difference.

THE COURT: I see no reason for expert testimony on a matter that is admitted.

MR. PLUMMER: Very well.

Q. You heard the testimony, did you, of these witnesses, as to just how this cable was connected with the drum, and the weight that was in the bucket and on the bucket, and the weight of the bucket itself?

MR. WAYNE: I object to even that preliminary question, for the reason that there is no question raised as to the buckets or the coiled cable on the drum, or the drum itself.

THE COURT: You would better finish your question.

MR. PLUMMER: Q. Assuming, however, — I will change the form of that question. Assuming now that by reason of the clutch not working, and there being no resistance to the drum conveyed from the clutch, no connection between the motive power,

the engine, and the drum, on account of the clutch slipping, as has been described here, and there being no resisting power upon the cable excepting the friction which would be caused by the drum itself in unwinding, and the resistance from the sheave wheel, over which the cable went, assuming that there was about 1200 pounds of weight in that bucket, I wish you would state approximately your opinion with reference to the speed at which that bucket would descend during the first 150 feet, that is, the maximum speed it would reach until control had been obtained by the operator of the hoist.

MR. WAYNE: I object to that as calling for the conclusion and the pure guess work and conjecture of the witness.

THE COURT: The objection is sustained. There is no justification for the assumption thus far that the clutch didn't offer any resistance at all.

MR. PLUMMER: I understood it was completely separated from the engine. He said it wouldn't hold at all. He said he lost control.

THE COURT: Well, he lost control, but you might lose control even with some resistance on the part of the clutch. He said he tried to raise the men later on, but he couldn't raise them, but it doesn't appear that if the load had been lighter that he couldn't have raised a lighter load. No one would be justified in concluding from the evidence thus far that the clutch did not come into contact at all with the drum shaft. If there is any doubt about that in your mind, if you think the contrary, you may recall these witnesses and ask them about that.



MR. PLUMMER: Well, I certainly would like to, because that is my understanding. I will withdraw you for a moment and will call Mr. Hare.

THE COURT: Mr. Hare wasn't present at the time. He wouldn't be competent to testify.

MR. PLUMMER: Well, I will call Mr. Lytton then. He said it was in the same condition it was in before.

THE COURT: No, he didn't testify that this bolt or set screw was loose or had been loosened.

MR. PLUMMER: I will call Mr. Lytton.

J. H. LYTTON, a witness heretofore duly sworn on behalf of plaintiff, upon being recalled, testified as follows:

DIRECT EXAMINATION by

MR. PLUMMER:

Q. Mr. Lytton, when this clutch was loose, as you have described, was there any resistance at all from the clutch on the drum?

A. Yes, there was some resistance.

Q. About how much?

MR. WAYNE: I object to that as calling for the conjecture of the witness. I don't know that—

THE COURT: Mr. Witness, supposing that the clutch and the mechanism connecting it was in the same condition when these men got on the bucket that evening and started down, and the other hoist man undertook to operate the hoist, suppose that he used the hoist lever, so far as he was able, would or would not the clutch come into contact with the drum shaft?



A. No, it was already throwed in as far as I could throw it, the clutch was. You see when I loosened the clutch I throwed the clutch out, and then I loosened the nut on the bolt to loosen the clutch band just enough to release the drum, and then by throwing the clutch back in, not tightening the nut, would give some resistance.

Q. That is, the nut being left in the way in which you left it?

A. Yes, sir.

Q. And throwing the clutch back in?

A. Yes, sir.

Q. It would afford some resistance to the drum revolving?

A. Yes, sir.

MR. PLUMMER: Q. Can you describe how much?

A. No, I couldn't exactly. I don't know how much, but it would be some.

Q. How much resistance would there be if there was 1200 pounds of weight on this bucket, pulling against this drum? Would there be any appreciable resistance?

A. No, not to hold that load.

Q. Would there be any appreciable resistance, anything you would notice?

A. Yes, there would be enough resistance so that it would hold and move your engine, and at times when this come around, this shaft being sprung, when it comes to certain places, would pick up and hold tighter right there, and just as soon as it would go over it would release again from the engine.

Q. It was intermittent?

A. Sir?

Q. Spasmodic or intermittent?

A. Yes, sir.

MR. PLUMMER: That is all.

CROSS EXAMINATION by

MR. WAYNE:

Q. Then as a matter of fact, when the clutch was loosened and this nut on the end of the clutch bolt was loosened, it held better because the shaft was sprung, didn't it?

A. No, it didn't hold as well, because it was loosened so that it couldn't hold, you see.

Q. That was the purpose of loosening it?

A. Yes, sir.

MR. WAYNE: That is all.

RE-DIRECT EXAMINATION by

MR. PLUMMER:

Q. On account of the shaft being sprung?

A. Yes, sir.

RE-CROSS EXAMINATION by

MR. WAYNE:

Q. No, the purpose was so you could pull off the cable, was it not?

A. If this drum shaft hadn't been sprung it wouldn't have been necessary to loosen the clutch bolt.

MR. WAYNE: That is all.

MR. PLUMMER: That is all.

Mrs. Witkowski will please take the stand.

BERTHA D. WITKOUSKI, produced as a wit-

ness on behalf of plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION by

MR. PLUMMER:

Q. Your name is Bertha D. Witkouski?

A. Yes, sir.

Q. You are the plaintiff in this case?

A. Yes, sir.

Q. And Mr. Witkouski, who was killed, was your husband?

A. Yes, sir.

Q. These two little boys are the boys of your—

A. Yes, sir, my children.

MR. WAYNE: Just a moment. There are certain admissions made in the answer. We admit the first five paragraphs of the complaint. We admit that she is the guardian of these children, that they are the children of the deceased; that the deceased was thirty-seven years old, or whatever is alleged in the complaint, at the time of his injury, and there is no issue upon that.

MR. PLUMMER: I think, if Your Honor please, for the purpose of showing just what the value of the care and custody, or the promised care, education, and advice and relations between the father and the children are, although we have alleged it in general terms, and it is admitted by the answer, I think we have a right even in the face of that to go into detail, and show just what his disposition was with reference to the care and education of his children, because that is an element of damage here, the loss of

it, and I think it ought to be allowed, so that the jury can form some opinion as to the value of the loss of those relations and the education and advice and surrounding conditions, and I think for the purpose of showing that, to show that these children are the same children referred to in the complaint.

MR. WAYNE: In the nature of things, of course, that isn't the purpose of it, if your Honor please.

MR. PLUMMER: It certainly is.

MR. WAYNE: And if they have not made their allegations of the complaint as broad in any of these respects, it is their own fault. We have made the admissions of the answer as to all of these facts just as broad as the allegations of the complaint.

MR. PLUMMER: The value of these very things that he admits exist—you can't show the value without showing the details of the particular service promised.

THE COURT: I don't understand what there is before the court.

MR. PLUMMER: I have asked just a preliminary question, as to whether or not these are the children referred to in the complaint.

THE COURT: Counsel admits that they are. Let us get on.

MR. PLUMMER: Q. Where did you live, Mrs. Witkouski, with reference to the mine that Mr. Witkouski was working in?

MR. WAYNE: I object to that, if Your Honor please. There is no issue as to that.

THE COURT: This wont hurt you, Mr. Wayne. The objection is overruled.



A. We lived at the Interstate, not very far from the mine.

MR. PLUMMER: Q. How far?

A. Oh, I don't know just how far it was. We could see the mine, though, from our house.

Q. And your husband, when he was done work, came home from there, walked home?

A. Yes, he spent all of his time at home only when he was at work.

Q. I wish you would state just what his disposition was with reference to caring for, advising and raising these two boys.

MR. WAYNE: I must object to that, if Your Honor please.

THE COURT: Is there an allegation or admission with regard to that?

MR. WAYNE: Yes, there is.

MR. PLUMMER: I want to show the details of it, for the purpose of estimating the amount of the loss.

THE COURT: What is the allegation?

MR. PLUMMER: Paragraph 20.

MR. WAYNE: "That at the time of the happening of the death of said deceased he was thirty-seven years of age, strong, able bodied, sound and robust mentally and physically, was industrious and devoted to his family and took great pains and care with their maintenance and education, and his family was dependent upon him for their support and maintenance.

"That the said Charles Witkouski was earning and



capable of earning at the time of his death and for a long time prior thereto upwards of \$6.00 a day. That had he lived, it was his intention to care and provide for his said family and to give the said minor children the benefit of an education. That they have been deprived of his love, comfort, advice, and counsel, and of his earnings and accumulations, and that by reason of all the matters and things herein set forth," and so on.

MR. PLUMMER: I want to show the value of the things that were promised by the father when he was alive, the value of them.

THE COURT: How are you going to show the value?

MR. PLUMMER: By showing his general disposition and the details.

THE COURT: That is admitted.

MR. PLUMMER: The details are not.

THE COURT: The details can't add anything to the general admission. If he was devoted to his family the jury can fill in the details.

MR. PLUMMER: Q. How much was Mr. Witkowski earning at the time he was killed?

A. He was getting \$5.00 a day and a bonus.

Q. What did those bonuses amount to on an average?

A. Well, the further down they went in the shaft the more bonus they got.

Q. I want to know about what income it brought in?

A. It would be six or seven dollars a day.

Q. Between six and seven dollars a day altogether?

A. Yes, sir.

MR. PLUMMER: That is all.

MR. WAYNE: That is all, Mrs. Witkouski.

MR. PLUMMER: We rest. Do you want us to prove the life expectancy?

MR. WAYNE: Why, I am not putting in your case.

MR. PLUMMER: I know that. I appreciate the fact that you are not trying this side of the case, but I thought you might admit that. It is usually admitted by counsel.

MR. TOWLES: It is 30.35 years, at 37 years of age.

MR. WAYNE: Do you take that from the American Tables of Mortality?

MR. TOWLES: Yes.

MR. WAYNE: I will admit that the American Table of Mortality shows an expectancy of 30.35 years.

MR. PLUMMER: With that, we rest.

MR. WAYNE: If Your Honor please, I desire to direct a motion to the court.

THE COURT: Do you prefer to do it out of the presence of the jury?

MR. WAYNE: Yes, I think it is best.

THE COURT: Gentlemen of the Jury, you may retire for a few moments.

(The jury thereupon retired from the court room.)

MR. WAYNE: If Your Honor please, at the close

of the evidence for the plaintiff, the defendant moves for a non-suit upon each of the following grounds, and for each of the following reasons:

1. That the plaintiff has failed to show any negligence alleged in its complaint which caused or contributed to the death of Charles Witkouski, in the following particulars:

While it is alleged in the complaint that the hoist man, Egbert, was incompetent and negligent, there is no proof or attempt to prove that he was either incompetent or negligent, or if incompetent or negligent, that his incompetency and negligence was known to the defendant, or, by the exercise of reasonable care, could have been known to the defendant.

MR. PLUMMER: I might say we will withdraw that allegation.

MR. WAYNE: For the reason also that it is charged in the complaint that the accident to the plaintiff was caused by the violation of the state statute, being the Session Laws of 1909, beginning at page 266, in each of the following particulars:

That the defendant was engaged in sinking and had sunk a vertical shaft to a depth of over 250 feet, without providing the said shaft with a bucket, skip, or cage, provided with safety clutches, and the evidence of plaintiff herself shows that the bucket in question was provided with the safety devices mentioned and described in the statute, to-wit, a fixed draw head.

The second violation of the statute is that it is claimed in the complaint that at the time of the ac-

cident the defendant was lowering the deceased and other men in this shaft by means of this bucket, at a speed exceeding 600 feet per minute, while the evidence fails to disclose at what speed the bucket was descending, and does affirmatively show that the plaintiff had used ordinary care to see that the bucket was not lowered at a speed in excess of that permitted by the state law.

The third violation of the statute is that it is alleged and claimed by the complaint that the accident was occasioned or contributed to by a failure of the defendant to post upon the gallows frame at the shaft or some other conspicuous place at the mine or in the mine a copy of the mining statute of 1909, while the evidence fails to show that there was such a failure, or that, if there was any such failure, that it was the proximate cause or a contributing cause to the accident to the deceased.

MR. PLUMMER: We admit that that wasn't the proximate cause.

MR. TOWLES: But it wasn't denied.

THE COURT: Do you rely upon any of these three provisions?

MR. PLUMMER: None except lowering the bucket at such a rate of speed.

THE COURT: That is, after the clutch failed to work?

MR. PLUMMER: Yes.

THE COURT: Then it would really come back to a question of the—

MR. PLUMMER: Yes.



THE COURT: Very well.

MR. WAYNE: Now, in so far as it is alleged and attempted to be proven that the condition of the clutch was defective, the evidence fails to show that it was defective, but does show that it was sufficient when properly adjusted, and that the failure to properly adjust it was either the negligence of the hoist man of the preceding shift or the hoist man of the night shift, or of the deceased himself, and that if it was the negligence of either of the hoist men, it was the negligence of a fellow servant of the deceased.

And, another ground: The evidence fails to show, although the charge is made in the complaint, that the brake or the clutch were inadequate, but on the contrary shows that they were sufficient to stop and did stop the descent of the bucket.

And because the evidence affirmatively shows that the deceased met his death by reason of his own culpable negligence.

If the accident was not caused by the carelessness of the deceased, it was caused or contributed to by the negligence of his fellow servant or servants.

The deceased assumed the risk, and each and every one of the risks, complained of by his complaint, including the risk of the negligence of his fellow servants.

Now I have mentioned all of these grounds because they are the acts or omissions that are charged in the complaint. I have enumerated these here, if Your Honor please, and I read now the charges that we were to meet:



First, that Joe Egbert, the hoist man operating the hoist at the time of the accident, was incompetent, inexperienced, nervous and excited. That is now out of the case.

Second. That the bolts, lugs and keys by which the clutch was fastened to the shaft of the drum was loose, worn, and inadequate.

Third. That the brake band and clutch were loose, worn out, inadequate, and unsafe.

There is no evidence as to the brake, as to anything being the matter with that, whatever.

The fourth is, that the clutch and band could not be adjusted by the lever under the control of the hoist man, so as to control the speed of the hoist.

The evidence affirmatively shows that not only could that be done, but that it actually was done at the time of this accident.

Fifth. That the state law was violated in the sinking of the shaft, without providing it with a safety clutch.

They have introduced no evidence on that, but on the contrary the cross examination of the witnesses—

MR. PLUMMER: We admit that that is out of the case.

MR. WAYNE: There is no such thing as a safety clutch.

And sixth. That the cage was being lowered at a greater rate than six hundred feet per minute.

Seventh. That a copy of the state law was not posted on the gallows frame. That is eliminated.

And they charged, eighth, that this company had failed to promulgate any rules for the hoisting or lowering of objects or men. They have apparently overlooked that. There was no evidence introduced; on the contrary, the evidence does show the adoption of written rules.

MR. PLUMMER: We intentionally eliminated that too, for we have certain rules, which are in evidence here.

MR. WAYNE: If Your Honor please, I apprehend that the only claim or grounds of negligence left in this complaint now, and in the evidence, is the claim that the clutch was defective, and for that reason would not hold. I want to take that up from two standpoints, first, as to the facts in regard to it, and, second, if it was out of order, how it got out of order, and, third, the knowledge of the deceased himself of that condition.

Now, the evidence of the plaintiff is undisputed that the real cause of that accident was that Lytton, the engineer or the hoist man on the preceding shift, had, for the purpose of pulling out that cable, loosened the nut on the clutch bolt, and had failed to tighten it, or failed to notify the crew coming on that he had done this, and that for that reason the next engineer began lowering the men without tightening that. The evidence is absolutely undisputed that had that been done the clutch would have worked all right. That is the testimony of Lytton, and that is the testimony of Egbert, and of all of the other witnesses who have testified upon the subject in the case.

Now it is the testimony of Lytton that Witkouski knew that that clutch had been loosened. He says he knew it—

THE COURT: Who testified to that?

MR. WAYNE: Lytton, the preceding engineer.

MR. PLUMMER: That wasn't his testimony at all.

MR. WAYNE: If there is an issue upon that point we will get the testimony.

THE COURT: I think not, Mr. Wayne, and you sought to impeach him by asking him the question whether he had not so stated to someone else, and he denied having so stated.

MR. WAYNE: I am very certain upon that point, if Your Honor please.

THE COURT: It escaped my attention then.

MR. WAYNE: Will you turn to the cross examination of the witness Lytton then, Mr. McClain, and find that part.

(The reporter thereupon began a search of Lytton's testimony, and the argument proceeded.)

(The jury returned into the court room.)

THE COURT: Gentlemen, will it inconvenience you to come at seven? I will make it some other hour, if that is more agreeable.

MR. PLUMMER: Anything suits me, Your Honor.

THE COURT: How about you, Mr. Wayne?

MR. WAYNE: That is all right.

THE COURT: Gentlemen of the jury, I am going to excuse you until seven o'clock this evening.

Remember the hour, and also remember the admonition that I have heretofore given you. You may retire.

(The jury thereupon again retired from the court room.)

THE COURT: This rule 28, gentlemen, provides that it shall be the duty of the mechanical department to daily inspect the hoisting ropes and engines to see that the same are in a safe condition and in proper repair, and if at any time the rope or any part of the machinery shall appear to be out of order, to have the same repaired before continuing with the hoisting.

Now I am inclined rather to take this view of the application of the well-known principles of law, that the occasion for doing what was done in this case, as a result of which the hoisting apparatus became inefficient for the purpose for which it was intended, was the slack in this new cable, incident to its use, that it became necessary to repair it or to readjust it, not because any sudden emergency arose, but, as one witness I think put it, to keep the cable from wearing out, rope or cable from wearing out or becoming impaired. Now I am not inclined to take the view under the testimony that the duty of making these repairs or these alterations or adjustments, whatever they may be called, rested upon the crew of which Mr. Witkouski was foreman. His duties were of an entirely different character. The hoist was simply being used as an instrumentality. He was not in charge of the hoist, in the sense that he



was responsible for keeping it in repair. It is true that the hoist man was subject to his direction for certain purposes, but only for certain purposes. If it be argued that some of the testimony tends to show that the hoist man was entirely under his control, subject to discharge by him, the weight of the testimony I think is clearly to the effect that he was not subject to be discharged by the pusher or foreman of this crew, that if his service in operating the hoist was unsatisfactory, he would be reported to the foreman or superintendent, and it would be for the foreman or superintendent to say whether he should be discharged or transferred or retained in that particular service. It is quite possible that for various reasons the hoist man might not be satisfactory to the crew, and in the operation of the mine the foreman might believe that he was a competent and efficient man, and still, in order to preserve harmony, might transfer him to some other hoist or set him at some other work, or discharge him entirely. I think that the testimony pretty clearly shows that such were the relations between these parties, and under this rule it seems to have been the duty of the mechanical department to take care of these hoists and to see that they were put in proper repair. Now if the testimony isn't conclusive, at least there is sufficient to require that the question be submitted to the jury, as to whether or not the hoist man, as to this particular condition or defect, was delegated by the mechanical department to remedy it or make the necessary repairs. My impression is, from the



testimony, that such was the understanding, that when the slack occurred in this cable or rope, the instructions from the mechanical department went to the hoist man to see that it was rewound or readjusted to the drum, in order to avoid unnecessary wear and perhaps impairment. Now, to do that it became necessary, as is suggested, to loosen this screw. It wouldn't have been necessary to loosen that screw if the drum shaft had not been sprung and had not been in a defective condition, as I understand the testimony. In other words, the mechanism was such that upon releasing the clutch lever the clutch would be disengaged entirely from the drum shaft, but because the shaft was sprung, as the drum revolved it would come into contact with the clutch at one point in the course of each revolution, and thus it would offer some resistance to the revolution of the drum. In that view, gentlemen, I think I shall have to adopt the conclusion that in readjusting the rope or cable for that purpose, in loosening this screw, and in leaving the clutch in that loosened condition, without advising the succeeding crew, the preceding crew was acting as the representatives of the master, as the representatives of the mechanical department, in the performance of a non-delegable duty or obligation, and that therefore the deceased would not be chargeable under the principle of the fellow servant rule. That being about the only question, as I understand, upon which counsel for defendant relies for a non-suit, the motion will be denied.

MR. WAYNE: We reserve an exception to the ruling.

THE COURT: Yes.

MR. WAYNE: If Your Honor please, I have quite a large number of witnesses. I don't know whether you want to go on tonight. I have some eleven or twelve witnesses. I don't suppose we can get through with them.

THE COURT: I think we had better go on tonight. Other parties and witnesses are waiting here, and we are a little behind, and I think we would better put in some time at any rate, even though we are unable to get through. Seven o'clock, gentlemen.

An adjournment was accordingly taken until 7 P. M., Friday, Nov. 24, 1916.

*7 P. M., Friday, Nov. 24, 1916.*

MR. WAYNE: If Your Honor please, and Gentlemen of the Jury, just briefly I desire to state to you at this time what the defendant's defense is in this case.

We will show you that on the night of this accident, and for some months before that time, three shifts had been working in that shaft, sinking it. It was a shaft that was in course of construction. That in lowering materials and men, and in hoisting them up, the company used a hoist which it had moved some time in the Month of March from what was called the old shaft, down to this new shaft which they were sinking. We will show you that this particular hoist is what is known as a Lake Superior hoist, made by the Lake Superior Machinery Company, at Marquette, Michigan; that it was put out, manufactured in 1914, and had been in use at the mine

very little over one year; that the hoist in question was in good condition at this time. You have already seen the photographs and had a sufficient description of the hoist to know the manner in which it was operated and the manner in which it did its work.

Witkouski, who met with the accident, was the boss of the night shift crew, consisting of four men besides himself, one hoist man, Witkouski himself, and three other men. That during the shift before Witkouski was injured, which was the day shift, and the pusher of boss of which was Jonas Jacobson, they had felt it necessary to take the kinks out of the cable that was wound around the drum of this shaft; that it was customary and proper and always done in a case of that sort, to release the clutch by turning the nut on the end of the clutch bolt, the reason for that being to release the friction of the clutch on the shaft of the drum, so that the men in taking hold of the cable with their hands and pulling it off the drum, would not have to pull against the additional friction of that clutch, and that upon this particular occasion Jacobson's crew did this; that after unwinding the cable they started in to rewind it, but eleven o'clock came before they were finished, and eleven o'clock was the time the shift changed.

Pausing at this point for a moment, we will show you that during the time Witkouski worked there that he was familiar with that hoist, that on not one or two, but on many occasions, when Egbert, the hoist

man, working under him, would be sent by Witkouski to some other place in the mine to get any materials that Witkouski wanted himself or his men to use, that he, Witkouski, would take this hoist himself and operate it during the absence of Egbert, and that he was perfectly familiar with the hoist and with the operation of the hoist, and with whatever its condition was at the time of the accident. That on this particular evening, when he went to work with his crew and saw that they were still rewinding this cable, he told Jacobson and his men to leave and go off shift, that he and his men would finish the job of rewinding this cable; that the Jacobson crew then did go off shift, and that Witkouski and his men rewound the few coils of cable that had not yet been wound upon the spool or drum of the hoist. That Witkouski then, with his three men, loaded the bucket with lagging, as has been testified to, and the men got on the hoist and started down. That, as the hoist engineer has already testified, he noticed the hoist was descending more rapidly than he desired it to, and that the reason for it was that the nut on the end of the clutch bolt had been loosened, by the engineer who preceded him. That immediately he applied his brake, that he applied it just as quickly as he could, consistent with a desire on his part and a purpose on his part to stop the hoist gradually, so that the danger of breaking the cable or of stopping it so suddenly as to jar the men off the rim of the bucket would be avoided. And it is already, I think, in evidence that the men who stayed in the bucket were saved.



This in brief is the defense.

We will show you that the hoist engine was in perfect condition all of this time, and that the only thing which caused the hoist to descend rapidly at all was the act of the preceding engineer in loosening that nut on the clutch bolt.

MR. PLUMMER: At the close of the opening statement of counsel for the defendant, the plaintiff moves the court to direct a verdict for the plaintiff, on the ground that if all of the statements made by counsel for the defendant are true, or if any of them are true, that said statements do not state a defense or a legal rebuttal of the evidence offered by the plaintiff.

THE COURT: The motion is denied.

MR. PLUMMER: We take an exception.

MR. WAYNE: If Your Honor please, might I have some indication as to how long you intend to continue tonight? I have one or two witnesses that I dislike to call out of order, but they do want to get away on the morning boat, and I will act accordingly, if I know how long—

THE COURT: Somewhere between an hour and a half and two hours.

MR. WAYNE: Very well. I will call Mr. Gregory.

SHERMAN GREGORY, produced as a witness on behalf of defendant, being first duly sworn, testified as follows:

MR. WAYNE: I desire at this time to offer in evidence Exhibits one to seven inclusive.



MR. PLUMMER: Is that the photographs?

MR. WAYNE: Yes.

MR. PLUMMER: I assumed that they were in. They can be, as far as I am concerned.

MR. WAYNE: Q. State your name?

A. Sherman Gregory.

Q. Where do you reside?

A. Interstate mine.

Q. You are employed there, are you?

A. Yes, sir.

Q. How long have you been employed at the Interstate?

A. About seventeen months.

Q. And what is your position at the present time?

A. Surveyor.

Q. Are you acquainted with Mr. Lytton?

A. Yes, sir.

Q. Who testified here today?

A. Yes, sir.

Q. Were you working at the Interstate mine at the time Witkouski met his accident, on the 18th day of last May?

A. I was.

Q. I will ask you to state whether or not you had any conversation with Lytton a few days after the accident?

A. I did.

Q. How many days after the accident was it, as near as you can remember?

A. Probably about ten days. As I remember, it was two or three days before Mr. Lytton left

there, and, as I remember, he left on the first of the month.

Q. Where did you have this conversation with him?

A. In the hoist room.

Q. Who was present?

A. There was no one except Mr. Lytton and I.

Q. What was the conversation?

MR. PLUMMER: I object to that, if Your Honor please. The foundation for impeachment must state in specific terms just what was said.

THE COURT: Sustained. You must put to him the question which you put to the other witness.

MR. WAYNE: Very well.

Q. I will ask you to state if, at that time and place, you had a conversation with Mr. Lytton in substance and effect as follows: You asked him if he knew how the accident happened to Witkouski, and if Lytton did not at that time point out the nut upon the clutch bolt and state to you in substance and effect that he had loosened that nut?

MR. PLUMMER: We object to that as irrelevant and immaterial, and not a question asked of Mr. Lytton as an impeaching question at all. He asked him if that was what he told Mr. Gregory about Witkouski's knowledge of the condition.

MR. WAYNE: This is part of the question asked him.

THE COURT: This is merely preliminary, I understand?

MR. WAYNE: Yes.

THE COURT: This of itself is unimportant, of course.

A. He did point out to me, not, that it had been loosened, but there was nothing said, as I remember, as to who loosened the nut.

Q. Will you state if at that time and place you then did not ask Mr. Lytton in substance and effect whether or not Mr. Witkouski knew that that nut had been loosened, and if Lytton did not then state to you in substance and effect, "Yes, he knew, because I told him so."

A. Yes.

Q. That is the conversation as you remember it?

A. Yes. And there was a few more words said when I left.

Q. What were the few words?

MR. PLUMMER: I object to that.

THE COURT: Sustained.

MR. WAYNE: Q. Now, Mr. Gregory, have you prepared a plat or map at my request, showing this hoist.

A. I have, yes.

Q. And it is made true to the dimensions of the hoist?

A. Approximately, yes.

A certain paper was thereupon marked DEFENDANT'S EXHIBIT NO. 8.

Q. Exhibit 8, which I show you, is the map or plat which you have made, is it not?

A. Yes, sir; that is a cross section.

Q. Now, Mr. Gregory, will you step over here?

Will you indicate upon the exhibit, Defendant's Exhibit No. 8, where the drum of the hoist is?

A. This dotted line. This is looking right into the hoist. This dotted line is the drum of the hoist, on which the rope went.

THE COURT: Perhaps you would better just explain to the jury that that is a cross section.

A. This is a cross section looking at the end of the hoist, right through the station, as though you stood and looked right into the station and down, looking right against the end of the shaft.

Q. The end of the hoist that you refer to is the end where the clutch is, is it not?

A. Yes, sir.

Q. And you are looking towards that end?

A. Right into the clutch.

Q. Where is the shive wheel?

A. Here is the lower shive wheel. The top of the upper one is about sixty-five feet above the floor of the station.

Q. Now the dotted or etched line that you have down the shaft, what is that?

A. I have tried to show here the cross head connected to the bucket by a chain; these dotted lines here are the chains, dotted because they are back of the guides.

Q. What are the cross pieces shown in the shaft?

A. These are the centers or dividers.

Q. How many compartments were there in that shaft?

A. Three.

Q. And down which of those compartments did the bucket run?

A. The center one.

Q. Will you indicate to the jury the clutch, upon this exhibit?

A. This dark line is the clutch band; here is one end and here is the other.

Q. The ends are indicated by the—

A. Some circles there.

Q. Circles?

A. Yes.

Q. Will you indicate to the jury where the clutch bolt is?

A. It is this bolt from this end of the hoist to this bearing right here. This is fixed, held in place, by three bolts, and this bolt goes through, with the big nut on the end, and this end controls the clutch, this collar, that slides in and out on the shaft, and it lengthens this arm here, attached to the end of the clutch band.

Q. And when the clutch lever is pulled back it tightens the clutch band, does it not?

A. Yes, that is the way it works.

Q. When did you make this map, Mr. Gregory?

A. I was working on it, on this one with another one, for two days before we came down here.

MR. WAYNE: Take the witness.

CROSS EXAMINATION by

MR. PLUMMER:

Q. What is your official position with the Callahan Company?



A. I am surveyor.

Q. Surveyor?

A. Yes, sir.

Q. And what position did you hold at the time this conversation you said occurred between you and Mr. Lytton took place?

A. I was sampler and surveyor's helper.

Q. Surveyor's helper?

A. Yes, sir.

Q. Then how long was it after you had this conversation with Mr. Lytton that you told any of the officers of the company with reference to that conversation, if at all?

A. Well, immediately.

Q. Immediately?

A. Yes, sir.

Q. And since that time you have been promoted to your present position?

A. Yes, sir.

Q. You had nothing to do with that particular shaft, did you?

A. No, sir.

Q. Or those men?

A. No, sir.

Q. Did you have anything to do with Lytton?

A. No, sir.

Q. Did you have anything to do with Witkowski?

A. No, sir.

Q. Or his men?

A. No, sir.

Q. What was you doing in there at the time?

A. You misunderstand me. I didn't say I was in there at the time of the accident.

Q. You say the bolt was pointed out to you by somebody?

A. Yes, sir.

Q. You was in there when it was pointed out to you. What was you doing there then?

A. If I may explain—

Q. Just answer my question.

THE COURT: No. He may explain.

A. My position at that time was to go all over the mine, which I do every day, and did at that time.

Q. For what purpose do you go over the mine?

A. Pardon me?

Q. For what purpose did you go over the mine?

A. Because Mr. Lytton asked me to.

Q. What was you to do over at the mine?

A. To see how things were going on and report to Mr. Newton.

Q. What things?

A. Everything.

Q. Machinery?

A. If I noticed anything wrong, yes.

Q. You was a surveyor's helper at that time, you say?

A. Yes, and sampler.

Q. Did that require you to go around and look at the machinery and how they was doing the work?

A. I probably went down the shaft right after that. I either went down or had been down the shaft.

Q. Did your position as surveyor's helper, and

your duties incident to the office of surveyor's helper and sampler, require you to go around and see how the machinery was and have it adjusted, and talk with the machinists and men?

A. It was merely my interest in the case.

Q. What case?

A. This particular accident, yes.

Q. Why was you interested in that accident any more than the usual sympathy that you would have for a person killed, or his family?

A. I wasn't.

Q. You said you were there on account of your interest.

A. Merely interested personally.

Q. Why was you interested—looking up evidence for the company?

A. No, sir, I was not.

Q. Why did you ask Lytton about it at all?

A. To satisfy my pure curiosity, is all.

Q. Why was you interested in ascertaining whether or not Witkouski knew anything about it?

A. Because the remark had been made that Mr. Witkouski was always in such a hurry, he was rushing everything, and it was hurry, hurry, hurry, all the time.

Q. And as a matter of fact, everybody else was in a hurry, wasn't they?

A. Perhaps.

MR. WAYNE: I object to that as not proper cross examination.

MR. PLUMMER: Q. Well then, that couldn't have been the reason, could it?

MR. PLUMMER: This is cross examination.

THE COURT: Proceed.

MR. PLUMMER: Q. Everybody else was in a hurry, weren't they?

MR. WAYNE: I object to that as not proper cross examination and immaterial.

THE COURT: What do you mean by everybody else was in a hurry?

MR. PLUMMER: All right then.

Q. Then if everybody else was in a hurry, and Witkouski was in a hurry with the rest of them—

THE COURT: I said, what do you mean by everybody else in a hurry?

MR. PLUMMER: I mean the pushers and foremen, and the people who were getting the ore out, generally. I want to show that if everybody else was in a hurry the way Witkouski was—

THE COURT: He didn't say Witkouski was in a hurry.

MR. PLUMMER: He said the remark had been made that he was.

Q. The remark being made that Witkouski was in a hurry, you say that was what excited your interest, to ascertain whether or not he knew about this being loose?

A. Yes.

Q. And then you went and asked Lytton about it?

A. I did.

Q. And then you immediately reported it to the

company, for their benefit in case of a law suit, didn't you?

MR. WAYNE: I object to that.

MR. PLUMMER: I have a right to show his interest in the case.

MR. WAYNE: It doesn't show interest.

THE COURT: The objection is sustained. The question is objectionable, the form of the question.

MR. PLUMMER: Q. You say, don't you, that as soon as you found out through Lytton that Witkouski knew about this being loose you immediately went and reported to who?

MR. WAYNE: That is repetition.

MR. PLUMMER: I say to who. It isn't repetition.

MR. WAYNE: He has already said that; he said Mr. Newton.

MR. PLUMMER: What position does Mr. Newton hold?

A. He is general superintendent.

MR. PLUMMER: That is all.

RE-DIRECT EXAMINATION by  
MR. WAYNE:

Q. Mr. Gregory, everybody else is interested—

MR. PLUMMER: We object to that as leading and suggestive, if Your Honor please.

MR. WAYNE: Wait until I ask the question.

THE COURT: Sustained.

MR. WAYNE: Q. State whether or not it is a fact that when a man is killed in a mine, that every-



one around the mine is interested in finding out how he came to have the accident?

MR. PLUMMER: We object to that as leading and suggestive, if the court please.

THE COURT: Overruled.

A. Yes, to the best of my belief and knowledge, it is.

Q. And you were interested in finding out how this accident happened?

A. Yes, sir.

Q. Mr. Gregory, was your promotion to your present position due in any way to this Witkouski accident?

A. It was not.

MR. WAYNE: That is all.

RE-CROSS EXAMINATION by

MR. PLUMMER:

Q. Then your interest, in conjunction with the usual interest which you say they all manifest there and have there, to ascertain how a man got killed, your interest then was simply to find out how he got killed?

A. It was, yes, sir.

Q. And you found out that he was killed by falling in some way down the shaft, didn't you?

A. Yes, sir.

Q. And you found out that that was due to some slip of this clutch or something, didn't you?

A. Yes.

Q. And that was all you cared to know, was how he got killed, wasn't it?

A. Yes, to know what that bolt was—

Q. Then you wasn't interested as to what he knew about the condition—

THE COURT: You must be fair with the witness. Your manner is somewhat objectionable, Mr. Plummer; I shall have to caution you against it.

MR. PLUMMER: Q. Then the only thing you was interested in was as to how he got killed, and you found out how he got killed, as I say, by falling down the shaft.

A. Well, I knew that.

Q. And it was on account of some slip in the machinery somewhere?

A. Yes, sir.

Q. And you wasn't interested in finding out how much he knew about machinery, were you?

A. If you will allow me, I will tell you—

Q. Please answer my question.

MR. WAYNE: The witness is answering the question. Go ahead, Mr. Gregory.

THE COURT: Proceed. Answer the question.

MR. PLUMMER: Will you read the question, Mr. Reporter.

(Question read.)

A. May I ask you who you mean by "he"?

Q. Witkowski.

A. I don't know just how to answer. The reason I asked, they had remarked, you know, or said, that the clutch had slipped, and I didn't know just exactly before this accident happened what they had loosened. I understood that something had been loosened,

and it was with that incentive that I went to Mr. Lytton and had him point out to me this nut, and when I went in he turned this hoist over and showed me exactly the nut that was loosened, and then followed the conversation that I had with him.

Q. Then after Lytton had shown you what had been loosened up and what caused the accident, that was as far as you had any interest in it, wasn't it?

A. Yes, it was just to satisfy my own interest.

Q. If that was all the interest you had in it, why did you ask Mr. Lytton with reference to Mr. Witkouski's knowledge of the condition?

A. Let me be sure I understand you.

MR. PLUMMER: That is all, sir.

THE COURT: Read the question to him.

(Last question read.)

A. Merely because I was wondering if Mr. Witkouski had forgotten that this nut was loosened, and got on the cage without tightening it.

Q. Well, that was the first time, however, that you knew that he knew anything about it, wasn't it, and therefore you couldn't have done it for the purpose of finding out whether he had forgotten?

MR. WAYNE: I think the answer of the witness is perfectly plain and clear, Your Honor.

THE COURT: No. He may answer.

A. It has been stated, Mr. Plummer, that the general understanding is—

MR. PLUMMER: Q. I didn't ask you what the general understanding is.

THE COURT: Yes, Mr. Plummer, you asked him

for his reasons for doing this. You can't require him to answer in a certain way. You must be fair with the witness.

MR. PLUMMER: I understood my question to be if that was the first time that he knew that Witkouski knew anything about it, and didn't know anything about Witkouski's knowledge up to that time, then how did he think that Witkouski might have forgotten.

THE COURT: Yes, but your questions are couched in such a way as to entrap the witness. I am not satisfied that you are endeavoring to permit the witness to speak the facts as he understands them.

MR. PLUMMER: I don't want to be unfair with the witness, Your Honor.

THE COURT: Your questions impress me as indicating an intention to be unfair with him.

MR. PLUMMER: If they do, I apologize to the court. I don't intend to.

(Question read.)

A. It was because it was the—I understood that this was the customary thing, to loosen this nut when the cable was to be re-wound, and I also understood that the pushers in that shaft were in charge of the hoist men and in charge of those men there working in the shaft, and for that reason I asked Mr. Lytton if Mr. Witkouski didn't know this, just to satisfy my own curiosity and to see who, in my own mind,—if anybody was to blame, and that was



my sole incentive in asking that question and in having the conversation I did with Mr. Lytton.

MR. PLUMMER: That is all.

RE-DIRECT EXAMINATION by

MR. WAYNE:

Q. It was just a casual conversation, was it?

THE COURT: No. That is leading.

MR. PLUMMER: That is leading.

MR. WAYNE: That is all, Mr. Gregory. Mr. Egbert.

JOE EGBERT, a witness heretofore duly sworn on behalf of plaintiff, upon being recalled in behalf of defendant, testified as follows:

DIRECT EXAMINATION by

MR. WAYNE:

Q. Mr. Egbert, will you state to the jury what was the condition of this clutch on the day Witkouski was injured, or the day he met with his accident?

A. Well, the day before I was using it all day, and it was O. K., and that night it was—that was all I was using it.

Q. Now, after the accident, will you state what, if anything, you did to the hoist engine before you went off shift?

A. I tightened the clutch up. I tightened the bolt.

Q. You tightened the one bolt?

A. Yes, sir.

Q. State whether or not that was the only thing you did, before you went off shift.



A. That is the only thing until we went off—never finished the shift.

Q. After the men came up, after the accident, the whole crew went off shift, did they not?

A. Yes, sir.

Q. They didn't work the balance of the shift?

A. Not that shift.

Q. Will you state to the jury what is the fact as to whether or not Witkouski had been running that hoist?

A. Any time he send me away for powder—

MR. PLUMMER: I object to that as not responsive.

THE COURT: I really didn't understand the answer.

(Last answer read.)

MR. WAYNE: He had just started the answer.

MR. PLUMMER: He can answer the question yes or no.

THE COURT: You can answer that yes or no.

A. He run it.

MR. WAYNE: Q. And on what occasions would he run the hoist?

A. Any time he sent me away.

Q. And were those occasions frequent or otherwise?

A. Every time we blast.

Q. How often did you blast?

A. Well, sometimes for two weeks straight.

Q. Every day, you mean?

A. Yes, sir, for two weeks straight.

Q. Did you blast more than once a day?

A. No; in twenty-four hours one shift blast, one shift muck, and one shift was drilling.

Q. And at all of these times when you blasted Witkouski run the hoist?

A. Well, he possibly don't run it much. He made possibly one trip or two. I was away for ten minutes or so, I believe. It was quite a ways down to the powder magazine.

Q. Will you state what is the fact as to whether or not the shaft on this drum was sprung?

A. I never noticed it. To tell the truth, I never noticed it, and nobody pointed it out to me neither.

Q. You I think said that you had been using it ever since for about two months?

A. For two months on the new shaft.

Q. And during that time you had never noticed any springing of the shaft on the drum?

A. I didn't notice it.

MR. WAYNE: Take the witness.

CROSS EXAMINATION by

MR. PLUMMER:

Q. During the time that Mr. Witkouski used the hoist on these trips you speak of, while you was away after powder, the clutch was tightened up then, wasn't it?

A. Well, yes.

Q. It worked all right, didn't it?

A. Worked all right.

MR. PLUMMER: That is all.

RE-DIRECT EXAMINATION by

MR. WAYNE:

Q. Will you state what is the fact as to whether or not Witkowski's shift had ever rewound this cable?

A. We re-wound it once before; our shift re-wound it once.

Q. State what, if anything, you did with the clutch, when you re-wound it that time.

A. You see it went very hard without loosening the bolt, and Mr. Hughes, master mechanic, was present, and we loosened the bolt, and when we start to re-wind he tighten it.

MR. WAYNE: That is all.

RE-CROSS EXAMINATION by

MR. PLUMMER:

Q. This other time that this same shift assisted in rewinding the coil, that you speak of, how long was that before the accident?

A. The cable was on the drum only I believe a week or so.

Q. About a week or so before the accident?

A. Yes, new cable.

MR. PLUMMER: That is all.

MR. WAYNE: That is all, Mr. Egbert. Mr. McDonald.

NORMAN McDONALD, produced as a witness on behalf of defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION by

MR. WAYNE:

Q. Your name is Norman McDonald?

A. Yes, sir.

Q. Where do you live?

A. Interstate.

Q. What is your position at the Interstate-Callahan mine?

A. Foreman.

Q. How long have you been foreman?

A. About twelve months.

Q. You were foreman during the month of May of this year?

A. Yes, sir.

Q. And you were acquainted with Charles Witkouski, were you?

A. Yes, sir.

Q. Mr. McDonald, were you at and in the mine the day when Witkouski met with his accident?

A. Yes, sir.

Q. Were you in there after the accident?

A. Yes, sir.

Q. About what time?

A. About eight o'clock the next morning.

Q. Who was with you at the time?

A. Charlie Mead was with me.

Q. What position did he take at that time?

A. Hoist man.

Q. On this same hoist?

A. Yes, sir.

Q. I will ask you to state to the jury whether or not, that morning after the accident, you made any examination of the hoist?

A. I looked it all over.

Q. Will you state whether or not there was anything out of repair in the hoist?

A. Not that we could find.

THE COURT: When was that,—the morning of that day?

A. Yes.

MR. WAYNE: Egbert testified that he went off shift and left it, and the only change he made in it was to tighten that nut, and then he went off shift.

Q. Will you state whether or not you at that time examined the clutch?

A. Yes, we looked it over.

Q. What condition was it in?

A. Good order.

MR. PLUMMER: If Your Honor please,, I think I shall object to that answer as simply being general. We tried to prove that it was in bad order, and counsel objected on the ground that that was a conclusion and a matter for the jury to determine. I think it would be the same thing on this answer here.

THE COURT: Would there be any other way of proving the affirmative? Of course, in proving the negative it wouldn't be sufficient to say that it was merely in bad order, but you would have to point out the respect in which it was in bad order. If it was in good order, that would cover all respects, wouldn't it?

MR. PLUMMER: I presume so; it probably would.

THE COURT: If you want to call his attention to anything you can do so on cross examination.



MR. WAYNE: Q. Will you state whether or not you found that the shaft on the drum had been sprung?

A. Not to my knowledge, and nobody ever reported it to me.

Q. What, after you examined the hoist, did you and Mr. Mead do in the way of experimenting with it?

A. I first sent for the master mechanic; I sent outside for the master mechanic.

Q. That was Mr. Hughes?

A. Mr. Hughes. We then took and loaded the bucket up with machines.

Q. What kind of machines?

A. Mining machines, weighed about a hundred pounds.

Q. Apiece?

A. Yes.

Q. Do you remember how many you put in?

A. Five, I believe.

Q. All right. Then what did you do?

A. I told Mr. Mead to lower the bucket down and run it up and down the shaft, and try the levers, and see if everything was in good order, which he did.

Q. In what manner did he run the bucket up and down the shaft?

A. He dropped it down with the clutch, and threw it in and pulled it out, tried the brake and the clutch, pulled it up and set it down,—several different ways to try it.

Q. By these experiments, will you state to the

jury whether or not you found anything wrong with the hoisting apparatus, either the hoist itself, or the clutch?

A. Nothing that we could find.

Q. Will you state what is the fact as to whether or not that hoist had remained in the same condition since that accident?

A. There has been no particular repairs done on it since.

Q. You have put an additional cable of some sort up to the cross head, haven't you?

A. That wouldn't be the hoist, though.

Q. The hoist itself has not been changed. Mr. McDonald, on these shaft crews that were working there at the time, how many men were there in each crew?

A. Four men and a hoister.

Q. Who wae the boss of the crew?

A. Witkouski, Jonas, and the other fellow's name I can't just remember.

Q. It was the pusher, whoever it was?

A. The pusher, yes.

Q. What is the fact as to the power and authority of the pusher of the shaft crew over the hoist engineer? What power or authority does he have over him?

A. He has full charge over him.

Q. What, if any, authority, has he to discharge the hoist man?

A. Yes, sir.

Q. Well, has he or has he not?

A. He has.

MR. WAYNE: You may take the witness.

CROSS EXAMINATION by

MR. PLUMMER:

Q. How did you happen to examine this hoist after this accident occurred, the next morning?

A. Well, it was very proper for us to look it over after an accident.

Q. Did you ascertain that it was due to the condition of the hoist that caused the accident?

A. Mr. Mead, the hoist man, wouldn't work until he sent for me; he wouldn't do nothing.

Q. That isn't answering my question, Mr. McDonald.

THE COURT: Read the question.

(Question read.)

THE COURT: That would be immaterial.

Mr. PLUMMER: Just to show his motive, as to whether or not he did.

THE COURT: Well, he has answered the question as to why he did.

MR. PLUMMER: Q. Who do you say it was that wouldn't work until you—

A. Mr. Mead, the hoist man.

Q. The following man?

A. The following man.

Q. Did he give you any reason why?

A. Well, I suppose after the accident he wanted to be sure that everything was all right, before he would start.

Q. My question is, did he tell you about any reason why?

A. No.

Q. You went then and looked the hoist all over?

A. Yes, sir.

Q. And it was all in good running shape at that time?

A. Yes, sir.

Q. So that it would hoist?

A. Yes.

Q. And lower people down?

A. Yes.

Q. This bolt or nut that we have spoken of here, that was tightened up then, wasn't it?

A. Yes, sir.

MR. PLUMMER: That is all.

RE-DIRECT EXAMINATION by

MR. WAYNE:

Q. What is the custom there with regard to this clutch bolt at times when a crew would be winding or unwinding the cable?

THE COURT: That is, if you know anything about it, of your own knowledge.

A. They used to loosen the clutch in order to let the spool reverse freely.

MR. WAYNE: That is all.

RE-CROSS EXAMINATION by

MR. PLUMMER:

Q. Did you see them do that?

A. Yes, sir.

Q. How long before this accident occurred?

A. Probably two days.

Q. Two days?

A. Yes.

Q. What engineer done that,—I mean the hoist man?

A. I just don't remember which one.

Q. And then it was tightened up again before they would try to use it to let men down?

A. Yes, sir.

Q. What was the object of loosening this?

A. To let the spool revolve freely from the rest of the hoist.

Q. Wouldn't that revolve freely if you disconnected the clutch, in other words, threw it out of gear?

A. No, sir.

Q. Isn't it the purpose of the clutch to throw the machine in gear, isn't that the object of it?

A. Yes, sir.

Q. And when you throw the clutch out, that throws it out of gear?

A. Out of gear.

Q. What is there then that retards the movement of the—

A. She appeared to fit tight so that you couldn't pull it off by hand.

Q. Do you know what made it fit tight?

A. No, I don't.

MR. PLUMMER: That is all.

RE-DIRECT EXAMINATION by

MR. WAYNE:

Q. It was made to fit tight, was it not, Mr. McDonald?



MR. PLUMMER: That is objected to as leading.

THE COURT: Sustained.

MR. WAYNE: Q. What is the fact as to whether or not the clutch offered some resistance even when it was thrown out?

A. Well, it might touch in certain parts as it would run and make it pull, the friction on it would cause it to pull.

Q. What kind of a lining did this clutch band have?

A. Belting or asbestos.

MR. WAYNE: That is all.

RE-CROSS EXAMINATION by

MR. PLUMMER:

Q. You say it might catch on certain parts of the drum. What parts do you mean?

A. Parts under the band.

Q. What would make it strike some parts and not others?

A. Well, the band might just happen to lay, not be perfectly on the same circumference as the drum, and might cause it to touch.

Q. If it had been looser you wouldn't need to unscrew this thing at all, would you, to operate this drum, if the clutch was thrown out?

A. If it was loose enough, yes, it wouldn't need to, no.

MR. PLUMMER: That is all.

MR. WAYNE: That is all. Mr. Mead.

CHARLES MEAD, produced as a witness on behalf of defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION by

MR. WAYNE:

Q. State your name?

A. Charles Mead.

Q. Where do you live?

A. Callahan-Interstate.

Q. Are you employed there?

A. Yes, sir.

Q. In what capacity?

A. Hoist man.

Q. How long have you been employed as hoist man?

A. At the Callahan?

Q. Yes.

A. Since the 14th of April.

Q. Of this year?

A. 1916.

Q. On what hoist are you now working?

A. What is known as the new shaft.

Q. That is the hoist we have been talking about, is it not?

A. Yes, sir.

Q. When did you go to work on that hoist?

A. On the 14th of April, 1916.

Q. What shift were you working on at the time Witkouski was injured?

A. I was on the day shift.

Q. You had taken Hare's place, had you not?

A. Yes, sir.

Q. Now, the day shift goes on shift at what time?

A. Seven o'clock.

Q. In the morning, and works an eight hour shift?

A. Yes, sir.

Q. What was the condition of this hoist the last shift you worked before Witkouski was killed?

A. It was in good condition.

Q. What was the condition of the clutch at that time?

A. It worked just the same as it had since I started there on the 14th.

Q. How did it work?

A. The way it was supposed to work.

MR. PLUMMER: I move to strike the answer out, as not responsive and simply a conclusion of the witness as to how it was supposed to work.

THE COURT: Well, did it work perfectly or imperfectly, is the question.

A. It worked perfect, the same as it had all the time that I was on the engine.

Q. Had you ever had any trouble with the hoist?

A. No, sir.

Q. Now then, will you state whether or not you worked the day shift after Witkouski was injured?

A. I did.

Q. You did?

A. Yes, sir.

Q. And you went to work at the usual time that morning?

A. Yes, sir.

Q. And who went with you?

A. The shaft crew.

Q. Anyone else?

A. No, just the shaft crew; we went in first.

Q. State whether or not Mr. McDonald and Mr. Hughes came in shortly after that?

A. They came in about eight o'clock.

Q. Had you examined the hoist in the meantime?

A. I looked it over.

Q. What, if anything, did you find with reference to the condition of the hoist?

A. I found nothing wrong.

Q. And what, if anything, did you find with reference to the condition of the clutch?

A. I found nothing at all.

Q. The same as it had been?

A. The same as it had been.

Q. Now, when Mr. McDonald and Mr. Hughes came in, will you state to the jury whether or not you made any tests or experiments to see whether or not the hoist was in good condition?

A. Mr. McDonald looked the hoist over, and he told the shaft man to throw these five machines in the bucket.

Q. Then what did you do?

A. He told me to try it.

Q. How did you try it? Just explain fully to the jury.

A. I let her down on the release to see that the clutch was tight enough to hold.

Q. What was the fact as to whether or not it was tight enough to hold?

A. It did hold.

Q. And in what manner did you run the bucket up and down the shaft?

A. I let it down on the clutch, and then I threw out the clutch and let her down on the brake.

Q. How did the brake work?

A. The brake held the machines, held everything.

Q. At what speed would you say you run it up and down?

A. I let her down on the release, let her go free, with the brake off.

Q. Will you state whether or not these tests and experiments disclosed anything wrong with the hoist?

A. They did not.

Q. You have been working there with that hoist ever since?

A. Yes, sir.

Q. And are now?

A. Yes, sir.

Q. Will you state whether or not there have been any changes made in the hoist?

A. Not at any time that I have been on shift.

Q. State whether or not there are any changes that have been made that you have seen or noticed?

A. New brake blocks, occasionally.

Q. You have to put new ones in occasionally?

A. Yes, sir.

Q. There have been no changes in the machinery itself?

A. Not that I know of.

Q. Who was your pusher at that time?

A. Ole Hoke, I think his name was.



Q. What supervision, if any, did the pusher use to exercise over you, the hoist man?

A. If he was in a hurry and wanted anything from down at the repair shop in the tunnel, I would go and get it, if he wanted me to.

Q. Who would run the hoist while you were gone?

A. She wouldn't run; we would let her stand.

Q. What, if you know, was the authority of the pusher, as far as discharging the hoist man was concerned?

A. Well, I think he could do it if he wanted to.

Q. That was the opinion that you had while you worked there?

A. Yes, sir.

MR. WAYNE: Take the witness.

CROSS EXAMINATION by

MR. PLUMMER:

Q. He never discharged you, did he?

A. No, sir.

Q. You never saw him discharge anybody else, did you?

A. No, sir.

Q. You never saw him hire anybody, did you, to run the hoist?

A. No, sir.

Q. As a matter of fact, you understood his duties and authority to be this, that as far as hoisting up materials and lowering down materials or men, he would give you signals when to lower them and when to hoist them?

A. Yes, sir.

Q. And at times he has requested you to go and get different things, and you have done it?

A. Yes, sir.

Q. You didn't feel, did you, that if you hadn't complied with that request to go and get these things he could discharge you for it?

A. No, I don't know as I did.

Q. You didn't think he could, did you?

A. I didn't know about his authority. I was given to understand that he had charge of that work, when I went to work.

Q. When you say work, you mean work down the shaft, don't you?

A. On his shift.

Q. He didn't ever assume to tell you how to run a hoist or fix your hoist or adjust it, did he?

A. No, sir.

Q. Who did tell you about that, if you was told by anybody?

A. When I needed any information like that I went to the master mechanic, Hughes.

Q. And you got the information from him if you needed it?

A. Yes, sir.

Q. At the time you run this hoist up and down as you have described, with these machines in the bucket, were they?

A. Yes, sir.

Q. This screw that has been spoken of here, that was tightened up, wasn't it?

A. It must have been tightened up, because that was the condition I found it in when I went on shift.

Q. This hoist is of the kind described here, that is, operated with a clutch, and the office of the clutch is to throw it in gear and out of gear, isn't it?

A. Yes, sir.

Q. When it is in gear then it is connected with the engine?

A. Yes, sir.

Q. When it is out of gear there is nothing to retard the unrolling, except the friction of the drum itself on the shaft that it runs on?

A. She is free then.

Q. Free?

A. Yes.

Q. But in this particular hoist, however, it is a fact, isn't it, that it was not altogether free, but there would be more or less friction, which would make it hard to run?

A. That would be in case you wanted to take the rope off.

Q. In case you wanted to pull it by hand, unroll the cable?

A. Yes.

Q. It would be harder to roll than the ordinary hoist?

A. Than the ordinary hoist?

Q. Yes.

A. She run off a little tight.

Q. What was the cause of that?

A. The friction gripped the drum a little.

Q. How many men did it take, when that screw was tightened up, and it wasn't, of course, loosened,

and it would run a little hard, as you have described, when it was in that condition how many men would it take to pull on this cable in order to unwind it by pulling on it?

A. It would take about five, that is, and open the release.

Q. What do you mean by that?

A. That is, release the air out of the cylinders.

Q. I mean when it is out of gear.

A. Yes

Q. Then the requirement of those five men to pull on that cable in order to unroll the spool was on account of this running hard feature that you have spoken of, that is, the extra friction?

A. Yes, sir.

Q. And in order to relieve that friction you loosened this screw you speak of?

A. Loosened the nut.

Q. If it hadn't rolled hard, as you have described, you wouldn't have needed to loosen this screw at all, would you?

A. If it had not rolled hard?

Q. Yes.

THE COURT: You mean if it hadn't been for this friction?

MR. PLUMMER: Yes.

Q. You wouldn't have needed to loosen the screw at all in order to let it run easy?

A. No.

MR. PLUMMER: That is all.

RE-DIRECT EXAMINATION by

MR. WAYNE:

Q. Mr. Mead, what is the fact as to whether or not that clutch was made so that it would cause some friction, even when it was thrown out, unless the nut was loosened?

MR. PLUMMER: I object to that unless he knows what it was made for. Of course this is a mere engineer there.

THE COURT: Yes, I think that question is objectionable. If you desire to ask him how they are generally made, as he has observed them, if he has observed them, you may ask that.

MR. WAYNE: Q. Mr. Mead, how long have you worked on hoisting engines?

A. Not long.

Q. Have you worked on them any other place except the Interstate?

A. Yes, sir.

Q. Where?

A. Well, in different places, different mines, throughout Montana and British Columbia.

Q. What kind of hoists have you worked on?

A. Sinking hoists, the same as this one.

THE COURT: You mean the same make, the same manufacture?

A. No, not the same engine, but the same style of engine.

MR. WAYNE: Q. They are all a good deal alike, aren't they?

A. A second motion engine.



Q. What do you mean by second motion engine?

A. Gear.

Q. The usual hoist in use where you have worked consists of this drum and a shaft on the drum and a clutch, which engages the shaft on the drum, does it not?

A. It does for sinking hoists in small mines.

Q. And for doing the work of sinking a shaft preparatory to making it a working shaft, that is the fact, isn't it?

A. Yes, sir.

Q. What was the custom at these places that you have worked on hoists when they would be unwinding the cable, as to whether or not they would loosen the clutch?

A. I don't know as I ever had occasion to pull a cable off like that.

Q. Do you know what the custom was with regard to this particular hoist?

A. In case of taking the cable off?

Q. Yes.

A. It was customary to loosen that draw bolt.

Q. And will you state whether or not that was understood among the different men who worked on these three shifts?

MR. PLUMMER: We object to this as calling for a conclusion and opinion, if Your Honor please.

THE COURT: Sustained.

MR. WAYNE: That is all.

RE-CROSS EXAMINATION by

MR. PLUMMER:

Q. How often did they take off that cable or wind it on, as you have described?

A. Well, it was a new cable.

Q. This one that was put on at the time of this accident?

A. It was a new cable about a week previous to the accident.

Q. And on account of its being new, that was the reason why they had to slip these loops over it once in a while?

A. Yes, sir.

Q. Was that on account of its being new and not as pliable as an old cable?

A. Being new and more or less spring in the cable.

Q. How long had the cable that was on there before this new one, how long had that been on there?

MR. WAYNE: I object to that as immaterial, if Your Honor please.

THE COURT: Overruled. Answer the question.

A. I can't tell you right the date.

MR. PLUMMER: I don't care about that—just approximately.

A. That cable had been on, I think, about two months.

Q. Then it was substantially about two months apart that they had these operations between—I will withdraw that. I will assume that when the previous cable was put on, for the first few days they had to do the same thing they were doing to this second new cable, for the first few days after that was put on. Do you understand my question?

A. No.

Q. Do I understand this: That the cable that was put on there before this cable they were putting on at the time of the accident, the one you say had been on there about two months before this, when that cable was put on, did they go through the same operation the first few days after that new cable was put on?

A. You mean did they re-wind it, the same as they did the second one?

Q. Yes.

A. No, they didn't.

Q. That didn't require that then?

A. No, sir.

Q. Do you know how long before they was re-winding any cable, before the time when they was re-winding this cable that was on at the time the accident occurred?

A. How long before they rewound the cable previous to this new one?

Q. Yes.

A. Well, they didn't rewind them at all to my knowledge.

Q. No cable at all before that?

A. They weren't taken off and rewound.

Q. I am referring to the kind of work you say these men were doing with this cable when they was re-winding it on this shift which Mr. Witkouski was killed on, and the shift you was on too, did you have to re-wind the cable there?

A. We re-wound the last cable.

Q. On your shift?

A. Once on my shift.

Q. How long was that before the accident?

A. Oh, it couldn't have been over a week.

Q. And how long before that was it that you or the men on that shift had re-wound a cable that was on before this, a previous cable?

A. About two months before, when we put that new cable on; we put it on and left it that way until we took it off.

Q. And when you put that on that went through the same operations,—re-wound it for a few days?

A. No, they didn't.

Q. They didn't?

A. No.

Q. Then it was at least two months?

A. Yes, sir.

Q. Prior to the time this new cable was put on?

A. About that. I aint sure to the date.

Q. Since they had gone through that operation of putting the cable on the drum or re-winding it?

A. About that time, yes.

Q. On the shifts that you worked on on this hoist, were the keys and things tightened up?

A. There was one key in the drum shaft that was loose.

Q. Was that also loose when you were making this test with these machines, lowering them up and down?

A. It was that way when I took hold of it.

Q. After the accident?

A. It was that way before the accident and after the accident.

Q. Is it that way yet? Are you running it yet?

A. I am running it yet.

Q. Is it that way yet?

A. There is a new key in it.

MR. PLUMMER: That is all.

RE-DIRECT EXAMINATION by

MR. WAYNE:

Q. Did the fact that the key was loose interfere at all with the running of the hoist?

A. It didn't interfere with the running of the hoist, no.

Q. Mr. Mead, when was it that you put on this new cable, how long before this accident?

A. As near as I can figure, it was about a week.

Q. And the cable before that had been taken off?

A. Took it off when we put the new one on.

Q. Was there any difference in these cables?

A. The same size.

Q. Will you state whether or not it is usual that you will have to unwind a new cable and take the kinks out of it and re-wind it?

A. You do on a drum of that size, because it is three laps across it.

Q. It was carrying something like nine hundred feet of cable, wasn't it?

A. I think it was more than that.

Q. More than that?

A. Yes, sir.

Q. At any rate, it was three turns or rows across the drum?



A. There was three turns across the drum.

MR. WAYNE: That is all.

RE-CROSS EXAMINATION by

MR. PLUMMER:

Q. Mr. Wayne asked you if this loose key you speak of had anything to do with the operation of the hoist. Just state how it affected the hoist at all, outside of the operation.

A. That key wouldn't affect it at all.

Q. Outside of the operation feature, how did it affect the hoist itself? What did it connect with? What relation had it to the clutch?

A. It keyed the clutch to the drum shaft.

MR. PLUMMER: That is all.

RE-DIRECT EXAMINATION by

MR. WAYNE:

Q. It is a fact, is it not, or state whether or not it is a fact that until that key was actually taken out it wouldn't affect the running of the hoist?

A. It wouldn't affect it, no, because we run it right along from that time until some time in August.

MR. WAYNE: That is all.

RE-CROSS EXAMINATION by

MR. PLUMMER:

Q. It didn't affect it when you run it. You don't know how it affected it when somebody else was running it, do you?

A. No.

MR. PLUMMER: That is all.

MR. WAYNE: That is all. Mr. Kaar.

G. C. KAAR, produced as a witness on behalf of

defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION by

MR. WAYNE:

Q. Will you state your name?

A. G. C. Kaar.

Q. Where do you live?

A. Wallace.

Q. What is your occupation or official position?

A. I am mechanical engineer for the Coeur d'Alene Hardware & Foundry Company.

Q. They are located in Wallace, are they not?

A. Yes, sir.

Q. Are you a graduate engineer?

A. Yes, sir.

Q. Of what school?

A. The University of Nebraska and the Michigan College of Mines.

Q. When did you graduate from the Michigan College of Mines?

A. In 1909.

Q. And what experience have you had particularly with hoisting machinery?

A. My experience with hoists has been confined to the last three years, with the Hercules people, and the foundry with which I am now connected. We manufacture small hoists.

Q. They deal in hoists, do they not?

A. Yes, sir.

Q. I will ask you to state whether or not you made an examination of the hoist at the new shaft in the Interstate mine, at my request?

A. I did.

Q. When did you make this examination?

A. Last Sunday.

Q. And in whose company?

A. Mr. Hughes.

Q. What sort of a hoist is that, Mr. Kaar?

A. It is a small double cylindered geared hoist, we call it.

Q. By what concern is it manufactured?

A. The Lake Shore people, up at Marquette, Michigan.

Q. How does it differ from other hoists of that type?

A. There is no particular difference. They are practically all alike. They are geared hoists, with a drum. You have to have a drum, and gears to drive the drum, and means to drive the gears.

Q. By what means is this hoist run?

A. By compressed air.

Q. Will you detail to the jury just what examination you made of that hoist?

A. The conditions under which I went up there, if I may state—

MR. PLUMMER: That isn't responsive to the question.

THE COURT: Well, get right to the point as quick as possible.

A. The accident had happened, as I was told when I got to the Interstate, and consequently it was up to me to look over that hoist for those particular parts that might break, as I thought. Naturally,

when a person is in the foundry business, he will look first if it is a casting, or if it is cast steel, or if it is hand forged. The parts which might break are the teeth of the pinion first, or the teeth of the gear which the pinion drives. Then look at the size of the shaft upon which the drum is mounted, the size of the shaft which drives the pinion, the manner in which it is geared, whether it is friction or clutch type of hoist. This is a friction type, and, detailing that, going to the friction, you size up the friction area, the material of which the friction band is made, and the material upon which the friction band is mounted, and how that band is connected with the rest of the machine.

Q. Now, Mr. Kaar, will you tell the jury what examination you made of the clutch and the clutch band.

A. The first thing to interest me was the size of the clutch and the clutch band, in order to determine the surface area, and from that you could estimate the friction per square inch with which the engineer could pull that down upon the ground, and so estimate what that friction surface would hold.

Q. And what is the size of that clutch band?

A. The clutch band is twenty-seven inches in diameter, practically, and the clutch surface of the drum is of course, the same. Around that clutch surface about three-fourths of the circumference is actual lined friction band.

Q. And what is the width of that band?

A. Four inches.



Q. Four inches?

A. Four inches.

Q. And what species of lining has the band?

A. Well, it is Johns-Manville asbestos stuff, that wont burn when it heats up under friction. Everyone uses that.

Q. You say everyone?

A. I don't know just the brand that it is, but all the mining people practically use this asbestos friction lining, which doesn't smoke and burn when the friction is on it. I think it is the same as they use on automobiles.

Q. They use it on the service brake on automobiles?

A. Yes.

Q. That is the exterior brake?

A. Yes, sir.

Q. Mr. Kaar, what examination did you make of the shaft on the drum?

A. Only in general, to see the way the material was distributed in the hoist, that is, was it a large shaft or was it an unduly small shaft upon which the drum was mounted. It was, as I remember, a three and a half or a four inch shaft. From one bearing to another,—that drum, of course, rests in two bearings, and I don't remember exactly how long that shaft was, but not over six feet; and anyone figuring those things,—you have got a beam there that is six feet long, of steel, and four inches in diameter, and consequently when you size up the comparatively small bucket you can estimate that it is ample.



Q. Will you state whether or not, from your examination, you discovered that the shaft of the drum was sprung at any place?

A. No, I didn't.

Q. Were you present during any time when the hoist was operated?

A. Yes, I have been up to the Interstate mine on different jobs and been inside.

Q. On this occasion did you have the hoist operated in your presence?

A. Oh, yes.

Q. Now what is the action of the clutch lever when it is pulled backward and forward?

MR. PLUMMER: If Your Honor please, I shall object to that. We tried to prove the same thing by our expert witness, who operated hoists of this character and hoists in general, and counsel objected, on the ground that it was calling for his conclusion.

THE COURT: Read the question, Mr. Reporter. (Question read.)

THE COURT: What do you mean by "What is the action"?

MR. WAYNE: Particularly—

THE COURT: What is its effect or function?

MR. WAYNE: Yes, particularly its effect on the clutch band.

THE COURT: Oh, he can answer that. That is a mere description of the mechanism.

A. The levers are so arranged and pivoted that a large motion of the lever on the part of the engineer gives a very small motion to the lever that actu-

ates this clutch band. The lever, when the engineer pulls it back there is a connecting rod that connects with the balance crank on the vertical shaft, and when they twist that number one crank it turns the shaft, which in turn moves number two crank, and the lateral motion of that number two crank pushes a shifting device, which slides along the shaft, and that moves a small toggle, which moves in a very small arc of a circle, and the actual motion of that last lever is a very small fraction of an inch, but sufficient to move another lever, which in turn tightens the friction band.

MR. PLUMMER: If Your Honor please, I don't think there is any issue in this case as to the general construction of this hoist.

MR. WAYNE: These are all preliminary matters.

THE COURT: No. Let us get along with this rapidly. This is merely preliminary, as I understood.

MR. WAYNE: Q. Mr. Kaar, what is the position of these clutch bands when the clutch is released or thrown out?

A. You mean with relation to the drum or the drum shaft?

Q. The shaft of the drum, yes.

A. It takes close watching with the eye to see very much motion in that friction band. The material isn't compressable at all, and when you tighten up on the clutch band it squeezes very tightly on the friction surface, and when it is let go the motion is

very small, but at the same time the intense pressure is not there that is there when a man has pulled the clutch lever and pulled it down. I don't suppose that the clutch band clears the clutch surface much more than probably a sixteenth or an eighth of an inch.

Q. From your examination of this hoist, and particularly of the clutch and the clutch band, will you state to the jury what was its condition?

A. The hoist was in good condition Sunday morning when I examined it, and I had the hoist man run it up and down the shaft a number of times, and hoist a loaded bucket, both for the sake of watching the operation of the hoist and to get an estimate of the horse power which it was developing. I not only took the speed of hoisting from the bottom of the shaft, but the general condition of the hoist.

Q. Do you mean to include in your answer the condition of the clutch and the clutch band?

A. That would necessarily follow, yes, sir.

MR. WAYNE: Take the witness.

CROSS EXAMINATION by

MR. PLUMMER:

Q. You are employed by whom?

A. The Coeur d'Alene Hardware & Plumbing Company of Wallace.

Q. Do they handle this make of hoist?

A. No.

Q. Did you ever run this kind of a hoist?

A. No, sir.

Q. When was it you made the examination you speak of?

A. Last Sunday morning.

Q. This last Sunday morning?

A. Yes

Q. How many hoists of this same make, do you know, have they in the mine?

A. I don't know of any other.

Q. Do you know whether or not this is the same hoist that this accident occurred in, except from hearsay?

A. I do not.

Q. And you don't know how many they may have of this same make in this same mine, do you?

A. No, sir.

MR. PLUMMER: That is all.

RE-DIRECT EXAMINATION by

MR. WAYNE:

Q. Did you notice from the name plate on this hoist the year it was put out?

A. Yes. It was made in 1914.

MR. WAYNE: That is all.

RE-CROSS EXAMINATION by

MR. PLUMMER:

Q. How do you know?

A. It is on the name plate. Each maker puts his name plate on there, and puts the date and the number of the machine on it.

Q. You don't know how much it has been used since that time?

A. I do not.

MR. PLUMMER: That is all.

MR. WAYNE: That is all. If Your Honor



please, that includes the witnesses I was trying to let go.

THE COURT: Well, you may put on one more witness.

RAY DELINE, produced as a witness on behalf of defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION by

MR. WAYNE:

Q. You may state your name?

A. Ray Deline.

Q. Where do you reside?

A. Interstate-Callahan.

Q. Are you working there at the present time?

A. Yes, sir.

Q. How long have you worked there?

A. Well, this last time since May 20, 1915.

Q. Were you working there in the month of May of this year?

A. Yes, sir.

Q. Whereabouts in the mine were you working?

A. At the old shaft.

Q. At the old shaft?

A. Yes.

Q. Under whom did you work?

A. Why, foreman McDonald, I guess

Q. Were you working in the month of May down at the new shaft?

A. No, sir.

Q. What was your particular job?

A. Running hoist.



Q. What hoist did you use at the old shaft?

A. At what time?

Q. When you were running the hoist, prior to March of this year.

A. The hoist they have got over at the new shaft at present.

Q. Do you know whether or not that is the same hoist that was in use at the time Witkouski met his accident?

A. Yes, sir.

Q. Is it the same hoist?

A. Yes, sir.

Q. How long had you run that hoist at the old shaft?

A. From July 7, 1915, to March 7, 1916.

Q. And then it was taken down to the new shaft, was it not?

A. Yes, or just a few days after that.

Q. How much of a load was that hoist pulling at the old shaft?

A. Well, before they took it away—

MR. PLUMMER: There is no issue, if Your Honor please, on the capacity of this hoist. I think that question is immaterial. We admit that if it was in a reasonably good condition of repair it would raise a reasonable load, including the load it was lowering down at the time this accident occurred, with safety.

MR. WAYNE: Take the witness then, with that admission.

CROSS EXAMINATION by

MR. PLUMMER:

Q. Were you on one of the shifts at the old shaft?

A. Yes, sir.

Q. How many shifts were there there at the time you worked there?

A. Part of the time three and part of the time two.

Q. Part of the time three and part of the time two, you say?

A. Yes, sir.

Q. And the hoist was run then continuously in hoisting operations that you know of, at the old shaft, from July, 1915, to March, 1916?

A. Yes, sir.

MR. PLUMMER: That is all.

RE-DIRECT EXAMINATION by

MR. WAYNE:

Q. How long is one of those hoists supposed to run, if you know?

MR. PLUMMER: Just a moment. He isn't qualified as an expert, as to the life of a hoist.

THE COURT: Sustained.

MR. WAYNE: Q. How long have you been a hoist man?

A. Well, if it is all put together, about two years and a half.

Q. Do you know what is the average life of one of these hoists?

MR. PLUMMER: If Your Honor please, I don't think the witness would be qualified to answer that

question, because the life of it would depend on how it is operated and used, and so many different things, that there is no standard, I think.

THE COURT: Why is it material anyway, with the admission that counsel has made that if this had been in proper repair it was sufficient at the time.

MR. PLUMMER: I meant in proper repair and condition.

THE COURT: You don't contend that it was out of condition in any other respect except the—

MR. PLUMMER: That is all, but I didn't want to use the word repair as distinguished from condition.

THE COURT: But you refer to the same thing.

MR. PLUMMER: Yes, the same thing. Outside of that, the capacity was ample, and these men could have been lowered with safety. That is all.

MR. WAYNE: That is all.

THE COURT: You may call one more witness.

EDWARD E. HUGHES, produced as a witness on behalf of defendant, being duly sworn, testified as follows:

DIRECT EXAMINATION by

MR. WAYNE:

Q. State your name?

A. Edward E. Hughes.

Q. Where do you live?

A. At the Interstate-Callahan mine.

Q. Are you employed there?

A. I am.

Q. How long have you been employed?

A. Three years and a half.

Q. What is your official position?

A. Master mechanic.

Q. Have you any assistants?

A. I have.

Q. How many assistants?

A. Well, that depends; it depends on how much work we have. I have from two to four, outside of the compressor men, outside of the operators.

Q. What was your position there in the month of May of this year?

A. I was master mechanic.

Q. How often did you, as master mechanic, inspect the machinery in the mine?

A. The machinery in the mine was inspected daily.

Q. And who was inspecting it immediately prior to the 18th of May?

A. I was myself.

Q. Do you remember when Mr. Witkowski met with his accident?

A. I do.

Q. When was the last time prior to his accident that you had inspected this hoist?

A. It was the previous night or evening, I should judge between seven-thirty and nine o'clock in the evening.

Q. What inspection of the hoist did you make at that time?

A. I looked at the cable, the clutch, the brake, and the bearings.

Q. What do you mean by the bearings?

A. You see the pinion shaft is supported by two bearings; it runs in two bearings, and also the drum shaft does, the thing that supports those.

Q. What was the condition of the hoist, and particularly of the clutch and the clutch band, at the time you made this last inspection?

A. It was all right.

Q. Will you state whether or not the shaft on the end of the drum was sprung?

A. It showed no bend at all or spring in it, absolutely none.

Q. Now when was the next time you inspected the hoist?

A. The next time was the following morning after this accident, about, I should judge, eight or eight-thirty o'clock in the morning.

Q. Who was present at that time?

A. Mr. McDonald, the foreman, and Charlie Mead, the hoist man.

Q. And what inspection did you make of the hoist at that time?

A. I examined the clutch, and that clutch bolt, and also the brake band, and all the mechanism that was connected from the lever clear to the brake band, to the final end itself.

Q. And what was the condition of the hoist at that time?

A. You mean the operating condition?

Q. Yes.

A. It was all right.

Q. And what was the condition of it after the



accident, as compared with what it had been at the time of your last inspection?

A. I could see no difference.

Q. And will you state now whether, after you looked this hoist over and inspected it, you made any further tests, or if any further tests were made in your presence?

A. The machines were not in the bucket when I got in. Well, there was nothing in the bucket when I got in. We ran the bucket up and down light, and then to satisfy myself further I held on to the brake while Mead opened the throttle, when we had the bucket pretty well down the shaft; and we couldn't slip the clutch, and I couldn't hold the brake tight enough so that the clutch would slip. I couldn't hold on to the brake tight enough so that the engine would slip the clutch. It was tight.

Q. How is that clutch loosened?

A. That clutch is loosened by loosening— You mean the clutch loosened in operation?

Q. No. The clutch band.

THE COURT: Well, in operation, you mean?

MR. WAYNE: No. At other times.

A. The clutch band on one end of it has a Tee bolt. It is nothing more than a bolt or an arrangement just like the letter T. Down here there is a thread, and there is a nut on that thread, and in order to loosen that you have got to unscrew this nut.

Q. And how large a nut is that?

A. That is an inch and a quarter nut.

Q. How large a bolt?

A. Inch and a quarter bolt.

Q. Now when you loosen that bolt it releases the clutch, does it not?

A. Yes, sir.

Q. How, in operation, do you release or apply the clutch?

A. The clutch is operated entirely by the clutch lever.

Q. When the clutch is thrown out, will you state to the jury whether or not there is any friction on the shaft of the drum?

A. When the clutch is thrown out there is friction, and that is due to this: The lining that we have on that clutch band is Johns-Manville Brake Lining, and it is the same thing as is used on the service brake on an automobile, and that offers a great frictional resistance, and the weight of that band alone just dragging on the clutch surface will tend to retard it enough so that it makes it hard to rotate, even though it is slight, that is, by hand.

Q. Mr. Hughes, about what is, if you can tell the jury, the play in the clutch bands?

A. I don't believe the movement is— it is under a quarter of an inch.

Q. Under a quarter of an inch?

A. That is, it corresponds to making it a quarter of an inch shorter, in case of releasing it.

THE COURT: I don't believe the jury will understand that. Can't you explain it a little more fully?

A. The clutch lever has two notches in it, a notch that is clear ahead, then it is loose, it is free, and

when it is back, it is tight, and that movement of the lever, the lever is about four feet, about four feet long, and you move the handle of that lever a distance of about eighteen inches, and that produces a corresponding movement to this clutch mechanism on the clutch band. On that friction band there is something less than a quarter of an inch, so you get an enormous pull.

Q. What you mean, Mr. Hughes, is that when you tighten the clutch with the lever it moves the band, the clutch band, only about a quarter of an inch?

A. Just about.

THE COURT: That is, it contracts it, you mean?

A. Yes, sir.

MR. WAYNE: Q. It contracts it?

A. Yes, sir.

Q. What is the condition of the hoist now as compared with what it was this morning after the accident?

A. You mean at the present time?

Q. Yes.

A. Why, everything is the same, with the exception that we have re-lined the wooden blocks on the brake, and we have put in a key in this drum shaft that Mr. Mead mentioned.

Q. Otherwise it is the same?

A. And of course, you know, there may— some hoist man may have tightened up some little nut or something that I don't know about, but to my knowledge everything else is the same. And of course

we replaced a rod that was wearing, that belongs to this clutch mechanism, and all that change—none of that was done—it was after the fourth of July—it was in the middle of July.

Q. Of this year?

A. Of this year.

Q. What is the custom, when cable is to be re-wound upon the spool or drum, as to releasing the clutch?

A. Well, it would be very difficult for—

MR. PLUMMER: Just a moment. I don't think that answer is responsive. He asked what the custom was.

MR. WAYNE: Well, he said it would be very difficult—

THE COURT: Get right at it. What is the custom?

A. Why release this clutch bolt and unwind the cable to the place where it is slack, and then re-wind it so that it is even.

Q. And then after it is re-wound the nut is tightened again?

A. The nut is tightened before you start to re-wind.

Q. Do you know whose duty it was to loosen and tighten that nut when the cable was being rewound?

A. It was the hoist man's duty.

Q. State whether or not there was any difficulty in either loosening or tightening that screw or nut?

A. No, there was not.

Q. Now, Mr. Hughes, will you state to the jury



whether or not anyone ever complained to you of the condition of that hoist or the clutch or any part of the hoist?

A. Well, the only complaint—well, it wasn't a complaint. The only thing was from time to time there would be some little thing that needed attention, and whatever little thing needed attention was attended to. I can't recall any particular complaint, of anybody saying the thing wasn't right, or anything like that, but maybe one man would say, "Did you notice that," and if there was anything like that we would work right at it.

Q. If there were any repairs to be made you made them?

A. Yes, sir.

Q. Did they ever notify you of any repairs which were needed which were not made?

A. They have not.

MR. WAYNE: You may take the witness.

CROSS EXAMINATION by

MR. PLUMMER:

Q. You was at the head of that department, I assume?

A. I was.

Q. And any repairs that was reported to you or that you knew of you would see that they were made?

A. I did.

Q. When did you ascertain, if at all, how this accident happened, Mr. Hughes?

A. The following morning when I came to work, about seven o'clock.



Q. You ascertained, didn't you, at that time that it was the dropping of the bucket or the going down of the bucket—

A. I didn't know.

Q. Wait a moment. I hadn't finished my question. Did you ascertain at all before you made these trial trips just what had caused the fall or the dropping of the bucket?

A. I didn't know a thing about it until in the morning and I was getting ready to go in, and missed the tram.

Q. I don't care anything about your missing the tram. I just want to know the time when you found it out.

A. I found it out when I got in the mine. Mr. McDonald told me.

Q. When was that that you found it out, when was the time you found it out, with reference to the time you made those test runs you speak of?

A. You understand I found out there was an accident that morning when I came to work. I was outside the tunnel. I wasn't in the tunnel. I didn't know anything about how it occurred or anything that had been said about it, or anything at all, until I went in, and that is when Mr. McDonald told you that he sent for me.

Q. That is the first then that you knew how the accident had occurred, was when you went in there?

A. Well, I didn't know—I don't know how it occurred. I mean that it the first that I suspected anything there, yes.

Q. When you found out how it occurred, did you ascertain at that time?

A. I don't know what you would—

Q. Wait a moment. Maybe I don't understand you or else you don't understand me. I understood you to say you found out there had been an accident, before you went in, is that it?

A. Yes.

Q. And after you went inside, where the hoist was, or in that vicinity, you found out then how it had occurred, did you?

A. No, I didn't.

Q. When did you first find out how it had occurred?

A. I don't know. I can't say. I wasn't there.

Q. Why, then, did you make these tests of the hoist?

A. Well, if something,—if a man got killed in a shaft, and they said the bucket got away, there must be some reason. I couldn't even tell you exactly who told me when I got in there that the bucket got to going too fast and Mr. Witkouski tried to jump off; but I naturally would go and look to see what would let it go too fast.

Q. You had ascertained then before you made these tests that the accident had occurred in some way by reason of the bucket going too fast?

A. I had heard that said. I didn't know that.

Q. That is what I mean. I don't mean that you saw it.

A. Well, I don't know even that. I couldn't even

say that I heard that it went too fast. I heard that Witkouski jumped off the bucket.

Q. Was that why you made a test of the hoist? Is that the reason you made a test of the hoist, to see how it run, because you heard he had jumped off?

A. Well, in the first place, the hoist was idle, and when anything happens it is customary to go and look over everything and see what is the matter before anything is done, because if it is wrong somebody else might go and do the same thing, and maybe they would get caught.

Q. But if you had heard that he had jumped off the bucket what would that have had to do with the operation of the hoist, in your estimation?

A. Nothing at all.

Q. As a matter of fact you found out, Mr. Hughes, didn't you, before you made these tests you speak of, of the hoist, you found out that the bucket had got away—

A. I did not.

Q. That the engineer had in some manner lost control of the bucket, at least for a certain period?

MR. WAYNE: If Your Honor please, I object.

THE COURT: All that counsel means, Mr. Wayne,—Your question is rather unfortunately worded. Of course this witness wasn't there.

MR. PLUMMER: No, I know.

THE COURT: He evidently thinks you are trying to get him to say that he knew or ascertained, as you put it, when of course he couldn't ascertain except what he heard. All that counsel means, as I

understand it, is, what did you hear about it that put you on your inquiry, if anything. Did somebody tell you something about it, and, if so, what?

A. When I got in there I couldn't even tell you who, or anything about that,—when I got in there I understood, or somebody must have said something,—I couldn't even tell you who said that the clutch slipped.

MR. PLUMMER: Q. That is why you made these tests?

A. No. I went in there anyway to see what was the matter.

Q. But I say, after that was told you, you made that test?

A. I was trying it then; I was looking at the hoist.

Q. Didn't you know that the reason the clutch slipped was on account of this screw being loosened?

A. I did not.

Q. If you had known that, of course the test you made wouldn't have been necessary at all, would it, because it was tightened up at that time?

A. The test I made showed that it was all right.

Q. This screw or bolt you speak of was tightened up at that time so that it worked all right?

A. It was all right, yes; the hoist was all right.

Q. That screw, I say, was tightened up at that time?

A. Yes, it was tight, or it couldn't have operated like it did.

MR. PLUMMER: That is all.



MR. WAYNE: That is all.

THE COURT: I desire to ask a few questions.

Q. Did I understand you correctly in saying that you had tightened up this screw before you re-wound the cable, after taking it off?

A. Yes.

Q. You would loosen the screw to unwind the cable?

A. Yes, sir.

Q. And then you would tighten it and then re-wind the cable?

A. Tighten up the screw and pull up the clutch lever, you see; you see there is a lever that operates that clutch, and in order to change that cable you simply release that lever, undo the screw—

Q. I had another impression from some of the other testimony as to what was done in this case. I understood some of the witnesses to say that the preceding shift had pretty nearly finished re-winding.

A. Yes, that is the way I understand it, I mean from what I have heard.

Q. How could they do that and leave this screw loose, if it was loose at the time the next shift went on duty, that is, Mr. Witkouski's shift?

A. The only thing that could have been was this: They pulled the lever up and didn't tighten the screw, I should imagine; I don't know.

Q. If it had been handled properly, you mean, by the preceding shift, that unwound the cable, they would have tightened the screw after they finished



unwinding and before they began to re-wind it? In other words, the shift before Mr. Witkowski's shift unwound or started to reverse this cable?

A. Yes, sir.

Q. I understood the witness to say,—I am not sure whether I am right about it,—that they had fully unwound the cable, and had pretty nearly finished re-winding, before Mr. Witkowski's shift came on duty. And yet one of the witnesses stated that after the accident, that is, the hoist, man, found this screw still loose.

A. Well, if it was still loose, they hadn't tightened it, that is all.

Q. Yes, but it was possible to tighten it before they began to re-wind it?

A. Yes, sir.

Q. And that, you say, would have been the proper way to do it?

A. The exertion the men put in there to re-wind that wouldn't be one per cent harder.

Q. That wouldn't be a proper way to do it?

A. It could be done either way. He could just pull back his lever, you see.

Q. But there was no reason for leaving the screw loose after they got it unwound?

A. No.

Q. I mean there was no mechanical reason?

A. No, sir, none whatever.

Q. It might just as well have been tightened at that time?

A. Might just as well have been tightened at that time.

THE COURT: I am not sure whether I understood the witnesses correctly on that. Didn't the witnesses say they had pretty nearly finished re-winding the cable?

MR. WAYNE: Yes, sir, all but about seventy feet.

THE COURT: Yes, that is what I thought. I don't want to mislead the jury, if my recollection isn't correct.

RE-DIRECT EXAMINATION by

MR. WAYNE:

Q. Just to make this perfectly clear, Mr. Hughes. After the nut was loosened on the clutch bolt, it was possible, was it not, by throwing in the clutch lever to re-wind the cable, without tightening this screw or nut?

A. Yes, within all reason it was. Of course a man could take that nut clear off, and then the clutch lever wouldn't operate at all, but it happened to be so that that nut, you couldn't screw it that far off because of the angle it took with respect to the internal circumference of the brake, so you couldn't have got it clear off.

Q. You get no friction on the clutch band?

A. That depends on how far it was screwed out.

Q. But on the other hand there was no reason why it should not be tightened before the work of re-winding the cable began?

A. There is no reason in the world why it shouldn't.

MR. WAYNE: That is all.

RE-CROSS EXAMINATION by

MR. PLUMMER:

Q. That tightening or loosening, though, is done by the hoist man?

A. It is done by the hoist man.

MR. PLUMMER: That is all.

RE-DIRECT EXAMINATION by

MR. WAYNE:

Q. Were you ever called in to tighten up the nuts and bolts?

A. Well, not a little, trifling thing like that. The hoist man is supposed to be able, and is able, to take care of those things, and if he wasn't able to do those things he couldn't hold his job there as hoist man, because that is part of his duties.

MR. WAYNE: That is all.

MR. PLUMMER: That is all.

THE COURT: Do you have other witnesses?

MR. WAYNE: Yes, I have.

THE COURT: Gentlemen, we will take a recess until tomorrow morning at nine-thirty. Remember the hour.

Accordingly an adjournment was taken until 9:30 a.m., Saturday, Nov. 25, 1916.

*9:30 A.M., Saturday, Nov. 25, 1916.*

MR. WAYNE: We offer in evidence Defendant's Exhibit No. 8, if Your Honor please.

MR. PLUMMER: No objection.

MR. WAYNE: And, except for the suggestion that Your Honor gave, that one of the jurors wanted to inquire of one of the witnesses, we rest.

THE COURT: You asked me last evening, Mr. Hurm, whether you could ask a question of one of the witnesses. If the witness is here, I will recall him now.

JUROR HURM: I don't think he is here—the foreman of the mine, Mr. McDonald.

THE COURT: Mr. McDonald, will you come forward?

NORMAN McDONALD, a witness heretofore duly sworn on behalf of defendant, upon being recalled, testified as follows:

EXAMINATION by

JUROR HURM:

Q. Mr. McDonald, I don't know whether I understood you rightly. Didn't you state in your last evening's testimony that shortly after the accident you went and inspected this hoist?

A. Yes, sir.

Q. And made trials of it?

A. Yes.

Q. And its workings?

A. Yes, sir.

Q. Are you a machinist?

A. No.

Q. Have you ever been running those hoists?

A. A little bit, not much.

Q. Then you don't really know anything about the construction or the mechanism of the machine?

A. No, not as a mechanic.

JUROR HURM: That is all.



DIRECT EXAMINATION by

MR. WAYNE:

Q. You know in what manner the hoist runs, do you not, Mr. McDonald?

A. Yes, sir.

Q. And you can tell whether or not the clutch is holding, can you not?

A. Yes, sir.

MR. WAYNE: That is all.

CROSS EXAMINATION by

MR. PLUMMER:

Q. I suppose, Mr. McDonald, that you have the same general knowledge of how to use the hoist, to raise up a bucket or let a bucket down, that an ordinary man would have that has a general knowledge of mining machinery, just in a general way?

A. Yes, sir.

Q. You are not, of course, an expert of the character that you believe would be competent to make inspections of machinery and report on the different things that are necessary, or anything of that kind?

A. No, sir.

MR. PLUMMER: That is all.

MR. WAYNE: That is all. We rest, Your Honor.

MR. PLUMMER: We will call Mr. Moran.

EDWARD P. MORAN, a witness heretofore duly sworn on behalf of plaintiffs, upon being recalled in rebuttal, testified as follows:

DIRECT EXAMINATION by

MR. PLUMMER:

Q. The day this accident happened, or any other



day, did you know anything about this bolt having been loosened?

A. No.

MR. WAYNE: I object to that, if Your Honor please, as immaterial, and also as not proper rebuttal.

MR. PLUMMER: Well, I don't know myself that it is necessary, if Your Honor please, but just in the exercise of an abundance of precaution I am offering it. There was some suggestion by some witness that he understood that it was the general understanding of the people in the mine that that thing was loosened from time to time. If counsel object on the ground that it isn't rebuttal he can't complain that we didn't offer it. So with that understanding I will withdraw the witness.

THE COURT: You may stand aside.

MR. PLUMMER: We rest.

MR. WAYNE: If Your Honor please, I desire to make a motion, or, rather, extend the motion I have already made.

THE COURT: It isn't necessary for the jury to retire for that purpose, is it? You mean you simply wish to re-present the motion at the present time, or to enlarge it, or what?

MR. WAYNE: To enlarge it, yes, somewhat.

THE COURT: I think you may go ahead.

MR. WAYNE: At this time, at the close of all the evidence, and when both plaintiff and defendant have rested, the defendant moves for a directed verdict in its favor, upon each of the grounds and for each of the reasons mentioned in the motion for a non-

suit, and particularly, but without waiving any of those grounds, for the following reasons:

1. That the evidence shows that the deceased assumed every risk and the risk of every defect mentioned in the complaint and mentioned in the evidence as grounds of negligence against the defendant.

2. That the deceased met with his accident solely and entirely by reason of his own negligence or contributory negligence.

3. That if the accident was not due to the negligence of the deceased himself, it was due to the negligence of a fellow servant or fellow servants, whose negligence was one of the assumed risks of the deceased, and for which negligence the defendant would not be liable.

4. That there is no actionable negligence proven in this case as the proximate cause of the accident to the deceased, and which is mentioned or described in the complaint. If Your Honor has the complaint there, I will direct your attention to paragraph B of Paragraph 12, Section B of Paragraph 12, which is the only charge of negligence now left in the case, and the negligence here sought to be proven is not the act or omission charged in the complaint. Furthermore, assuming everything in favor of the evidence for the plaintiff, and assuming even that there was this sprung shaft, still that was not the proximate cause of the injury, but the proximate cause of the injury was the loosening of that bolt.

THE COURT: The motion will be denied.

MR. WAYNE: We will save an exception.

THE COURT: Yes. I may say to you, Gentlemen of the Jury, that the denial of this motion is of no interest to you. It will still be for you to pass upon the questions of fact, under the instructions that I shall ultimately give to you. If there is any evidence at all to support a certain proposition, it is the duty of the court to submit the question to the jury. It is only where the evidence is insufficient as a matter of law, taking the most favorable view that can possibly be taken of it to the plaintiff, that I can take the case from the jury, and here in my view there are some disputed questions of fact that must be submitted to you. In denying this motion you are not to infer that I have any opinion one way or the other as to the preponderance or weight of the evidence, or as to whether you should find for the plaintiff or for the defendant.

(Counsel upon both sides thereupon made their arguments to the jury.)

THE COURT: Gentlemen of the Jury, the pleadings and also the evidence in this case have taken rather a wide range, but, as not infrequently happens in the trial of a law suit, when all has been said that can be said, the real issues become rather narrow, and, as I shall explain to you in the course of my instructions, you will find that there are comparatively few issues of fact for you to pass upon in this case, and that those issues are controlling of the rights of the plaintiffs and the defendant. The plaintiffs rely upon a statute of the state by which

it is provided that where one is employed by another, and he meets his death as a result of the negligence of his employer, the failure of his employer to perform some duty to him, as a consequence of which he meets his death, the heirs of such deceased person may recover damages for such negligence from the employer. Acting under that statute, the plaintiffs here, Mrs. Witkouski and the two children represented by her as their guardian, have come into court claiming that they are the only heirs of the deceased, Charles Witkouski, and further claiming, as you have heard, that he met his death through the negligence of the defendant company. It is conceded that Mrs. Witkouski and the two children are the only heirs, and that if anybody is entitled to recover on account of the death, they are entitled to such recovery. So that there is no issue upon that question.

Now, as already suggested, it is a prime consideration whether or not the death was the result of a failure on the part of the defendant company to discharge some obligation which it owed to the deceased at the time of his death, that is, was it negligent, and did such negligence, if any there was, contribute to his death.

Generally speaking, negligence may be defined as the performance of some act, the doing of some thing, which, under the circumstances, a reasonably prudent and careful person would not do. You will see that the standard is not an absolute or arbitrary one, but it is a question of what ordinarily reasonable, careful persons, properly regardful for the rights



of others, would do under the particular circumstances, or, the converse, it is the leaving undone of some thing, some act, which such prudent and reasonably careful persons would have done under the circumstances. It may be negligence of commission or negligence of omission.

Now, I am also going to refer to what in law is known as contributory negligence, that is, the negligence of the person injured, in this case Mr. Witkouski, who lost his life. Contributory negligence is defined in the same way, that is, it is the doing of some thing which a reasonably careful person would not do, or the leaving undone of some thing which a reasonably careful person would do, under the circumstances. It is called contributory negligence because it is charged to be the negligence of the person who is making the claim or upon whose behalf the claim is being made. The same definition, however, applies to negligence, whether it be primary or contributory.

There are in the complaint a number of charges, or, rather, charges of a number of particulars in which the defendant failed to perform its obligation to the deceased or to do its duty. Most of those have been eliminated, that is, the plaintiffs have abandoned all of the charges of violation of certain statutes of the state relating to the operation of mining properties in the state, and they are therefore withdrawn from your consideration. Generally speaking, the ground upon which the plaintiff finally relies is that the defendant company failed to discharge a duty



which the general law imposes upon all employers of others. That may be defined in this way: One who employs another must use reasonable care to see that the place where the servant or employe is asked to work is reasonably safe for the performance of the servant's duties, and by reasonable inspection at reasonable intervals to see that it is kept reasonably safe. That duty applies not only to the place where the employe works, but to the instrumentalities or tools with which he is asked to discharge his duties. I say that it is a duty applicable to all employers of labor, it makes no difference in what line of activity or employment. It is applicable to the mine owner, it is applicable to the owners of railways or boats or of lumbering plants, or of farms. It is always the duty of the employer to use reasonable care to see that his employe has tools or instrumentalities which are reasonably safe, and also that the place in which he works is reasonably free from danger. Now that is the general duty which the plaintiffs contend the defendant violated, and that, by reason of its failure to discharge that duty, the accident occurred; and it will be for you to say whether, under all the circumstances of the case as you believe them to be from the evidence and the instructions which I give you, the charge is sustained in this respect.

The defendant, upon the other hand, contends that even though it may appear that the instrumentality to which the accident was due was out of order or in a defective condition at the time of the accident, it

is not responsible, under another principle of law which is equally well recognized, and which is equally binding upon you, and by which you are controlled to the same extent, and that is, that the deceased himself was guilty of contributory negligence, in that, having knowledge of the defective condition, or, rather, having charge of the instrumentality, the hoist, and further being charged with the duty of seeing that it was kept in a safe condition, he failed to discharge that duty, and that as a consequence of his contributory negligence in failing to inspect and keep the hoist in proper condition, he met his death. I have to say to you that it is a general principle of law, binding upon the courts and upon the jury, that if a master is guilty of negligence, and the employe, the person who is injured, is also guilty of negligence, and if such negligence contributes to the accident complained of, or the injury for which a recovery is sought, a recovery cannot be had. In other words, if one is negligent himself, and his own negligence contributes to his injury, he cannot recover if he is injured, nor can his heirs recover if he loses his life.

There is still the further principle of law, which is equally binding upon all of us, and that is, that where one enters upon work for another, or, in this case, to be specific, where Mr. Witkouski entered into the employment of this defendant company, he impliedly agreed that he would take the chances, he would assume the peril, or, as it has been frequently put during the course of the trial, he would assume

whatever risk there was incident to the possible negligence of his co-employees, his fellow servants. That is to say, he would relieve the defendant company from any liability or responsibility for any damage or injury which he might suffer as a consequence of the negligence of some other employe engaged in the same line of service with him. To give you an illustration about which there could not be any doubt, if this accident had occurred as a result of the negligence, for instance, of one of the other two men who were engaged with him in sinking this shaft, he could not recover, however gross that negligence might be, because when he entered the employ of the company and undertook work with these other two men in the same department, he impliedly, under the law, said to the defendant company: "If one of these men is negligent and I am injured as a consequence, I will not hold you responsible. I recognize the fact that one of them may be negligent, and that I may be injured, but that is my look-out. I will take the chances." Now all of these three or four principles of law that I have explained to you are well settled, prevail in this jurisdiction and in this court, and they are all equally binding upon all of us, and we can't ignore one of them without violating our duty.

Now further in explanation and limitation of these principles, I refer again to the general duty of all employers to use reasonable care to provide a safe place and to provide safe instrumentalities for the employe. That duty is not delegable, as we put it. In other words, it is always the duty of the employer,

here the defendant company, to use reasonable care to see that its mine is reasonably safe, and that the instrumentalities with which the miners work are in a reasonably safe condition. Now if any one of its employes, even though he may be working in the same part of the mine as the person who is injured, if any one of its employes or agents fails to discharge its duty in that respect, that would be no defense to a claim brought by someone who is injured, provided that person himself is not responsible for the defective condition of the mine or instrumentality. In other words, one who is charged with the duty of performing what it is the master's duty to do, here the defendant company's duty to do, of keeping the mine in safe condition, or the instrumentalities in safe condition, cannot be a fellow servant or employe with another, so that in this case if you find that the accident was the result of the negligence of some one who was acting for or in the mechanical department, rather than the operating department, then that is a risk from another employe of the defendant company which the deceased did not assume. He assumed risks from the negligence of fellow employes only when those employes were in his department, the mining department, rather than the mechanical department.

Now let us endeavor to apply these principles. The defendant concedes that the accident in question, that is, the too rapid descent of the bucket, upon the night of the accident, was due to the fact that the clutch would not properly perform its function, for



the reason that some one had loosened a screw and thus released the clutch so far that by the use of the lever it would not engage closely with the drum or that part of the drum that it was intended to engage with, and therefore would not control its speed. And I have to say to you that the evidence very strongly tends to show that the condition of this screw or bolt or nut is the proximate cause of the injury, or the accident, rather, and is the only immediate cause of the accident. There is some evidence tending to show that the shaft of the drum was sprung. However, the plaintiffs do not allege, and, as I understand, do not claim now, that this sprung condition of the shaft, even if you credit that testimony, directly contributed to the accident. That was brought in only for the purpose of attempting to explain why it was necessary to loosen this screw or bolt or nut. The defendant contends that it was not sprung, and that that is not the reason for loosening the bolt or nut, and the plaintiff contends that it was. But it is not alleged, and it is not now claimed, that the condition of the shaft or the drum in any wise affected the operation of the hoist upon the evening in question at the time the accident occurred. In other words, the clutch would not have held any better had the shaft been in perfect condition. The fact, if it be a fact, that the shaft was sprung, did not in any wise affect the hoist man's control of the hoisting machinery at the time in question. There is some evidence also tending to show that certain keys were loose in and about the mechanism which con-



trolled the clutch or had to do with the operation of the drum, but I have to say to you that there is no substantial evidence tending to show that the condition of these keys in any wise affected the hoist man's control of the hoist at that time. Now I have said this to you in order that I may make clear the issue upon which you are to find, as I understand the evidence, at the same time explaining to you that you are not bound by any expressions as to the weight of the evidence or credibility of the witnesses or what the evidence shows, that I may make, unless the suggestions commend themselves to you as being the reason of the case and as being supported by the weight of the testimony. In other words, as I shall say to you finally, you are the sole judges of the weight of the evidence and the credibility of the witnesses, and you may disregard any comment that I may make upon the facts. I have referred to the issues of fact and to the evidence only for the purpose of making clear to you certain principles of law.

Now, assuming that you may find that, as is conceded by the defendant, the accident was due to the loosening of this screw, and the consequent inefficiency of the clutch, the question is, who is responsible in fact for that condition, and what bearing in law has such responsibility upon the claim which is here being asserted by the plaintiffs. The defendant contends that Mr. Witkouski, the deceased, was in charge of this crew, and that, being in charge of the crew or group of men, including the hoist man, it was his duty and the responsibility was upon him

to see that a proper inspection of the hoisting apparatus was made, and that it was in proper condition, and that if he failed to perform this duty, and, as a consequence, was injured, the injury must be deemed to be the result of his own failure to do his duty, and therefore, under the principle I have stated, of course, the plaintiffs here could not recover. Now it is in evidence that he was at the head of this crew, for certain purposes at least. It is conceded by the plaintiffs that he had charge of the crew in so far as the operation of sinking this shaft was concerned, but they contend that he did not have charge of the motor man, or hoist man, in so far as the operation and maintenance and repair of the hoist were concerned; that the only control he had over the hoist man was to give him the signals and tell him what to do in using the hoist, but that he had nothing to do with and was charged with no responsibility relative to keeping it in repair or seeing that it was in a safe condition. And right there arises the sharp issue, and, as I think, the controlling issue in the case. The defendant on the other hand contends that he had entire charge of the crew, including the functions of the hoist man in taking care of and seeing that the hoist was kept in repair. Now then, gentlemen, if from all of the evidence you find that Mr. Witkouski did not have control of the hoist, that he was not charged with the responsibility of keeping it in repair, if he did not have the direction of the hoist man as to what should be done from time to time in seeing that the hoist operated properly, but

that he could only direct him in so far as giving him the signals and telling him when the hoist should go up and go down, and how rapidly, and so forth, and further that the hoist man, in so far as the mechanical work of keeping this hoist in condition was concerned, was under the control and direction of the mechanical department, ultimately the master mechanic, then you could not find that the hoist man is a fellow servant with the deceased, and therefore the negligence of the hoist man in loosening this screw and leaving it loose, would not be a risk taken by the deceased, and if he was injured as a consequence of such negligence then the plaintiffs here could recover, provided,—and here is the limitation upon that,—provided Mr. Witkouski did not know or have reason to believe that the screw was loose at the time, and, further, was unable to appreciate the danger therefrom. Even if he was not to blame, and if no fellow servant of his was to blame, for leaving this screw loose, and yet he knew that it was loose, and, by reason of his experience or what he had been told, or by the use of his own common sense he was able to appreciate the danger, and still, knowing the facts, and appreciating the danger, he for any reason, owing to his desire to get on with the work, or through recklessness, or for any other reason, went ahead and entered the hoist that evening for the purpose of being carried down, and lost his life, he could not recover, because then he would have assumed that risk. Upon that hypothesis, he knew of the danger, and, knowing of it, he took the

chance. No man can, with an appreciation of a danger, go ahead and take the chance, and then recover from the person who is responsible for the peril.

I think I have already explained to you that even if, upon the other hand, you find that the accident was due to the fact that this screw had been loosened by Mr. Lytton, I think it is,—the former hoist man,—and had negligently been left loose by him, and that he had not informed the succeeding hoist man, or Mr. Witkowski, or the other members of the crew, of the fact, still if you further find that the hoist man, in the matter of keeping the hoist in condition, was acting under the direction and control of Mr. Witkowski, they would therefore be fellow servants, and neither Mr. Witkowski, nor his heirs, could recover for such negligence. You will see that the whole issue there is as to whether or not the hoist man was under the control of Witkowski so far as the mechanical work was concerned of keeping this hoist in condition, or whether he was under the control and direction of the mechanical department, and therefore was representing the master in the performance of this primary duty of keeping the appliances and instrumentalities in a proper condition of repair.

Now there is a further consideration, gentlemen. Some suggestion has been made, and perhaps the argument has been made,—I wasn't giving very particular attention to it at the time,—that the deceased cannot recover because he was guilty of contributory negligence in jumping from the hoist bucket at the



time he did, and thus losing his life. It appears that the other three men remained in the bucket or upon the bucket, and suffered no serious injury, but that Witkouski jumped, and thus lost his life. It doesn't necessarily follow that because he jumped and was injured, and the other three men who were with him remained on the bucket and suffered no injury, he was therefore guilty of a careless act which constitutes contributory negligence. It doesn't follow that because one who in the presence of danger, being under the necessity of choosing between two or more alternatives, chooses badly, he is guilty of contributory negligence. The general question which you should ask and answer as to this particular phase of the case is whether or not, in the light of all the circumstances, under all of the conditions, the deceased acted reasonably. Did he, in the presence of the danger, being suddenly confronted with an emergency, did he act in a reasonable way? It may have turned out not to be the best way, but that is not conclusive. Would a reasonable man have acted in the way he did? If so, and even if it be a mistake, he could not be charged with contributory negligence in that respect.

Perhaps, to sum up, and to state what I have already said to you in a somewhat different way, if you find from the evidence that the witness Lytton, who was the hoist man on the shift immediately preceding him, was under the direction and exclusive command and authority of the master mechanic or general foreman, or both, and that Witkouski had



no authority over or right to give orders to or direct said Lytton as to the matters and things incident to or pertaining to keeping said hoist in a reasonably safe condition of repair and efficiency, and the said Lytton, when he went off shift, left the same in an unsafe condition of repair and efficiency, without notifying the succeeding engineer, Egbert, of such condition, and that his failure to so notify said Egbert was the proximate cause, or contributed to the death of the deceased Witkouski, then you should find for the plaintiffs, unless you find that Witkouski was at the time informed or knew of the mechanical conditions existing in and about the hoist, and was able to appreciate the risk incident thereto, and still, notwithstanding such knowledge and appreciation, attempted to ride down upon the bucket as it was being lowered into the mine.

In passing upon these issues, gentlemen, I have to say to you that the burden is upon him who asserts the existence of a fact to establish it, and in a civil case of this character to establish it by a preponderance of the evidence. By a preponderance of the evidence is not necessarily meant a greater number of witnesses, but a greater weight of the evidence. That is what the word "preponderance" means,—evidence which convinces you that the truth lies upon this side or that. It is that which is more convincing, more persuasive. The burden therefore is upon the plaintiffs in the first place to show by a preponderance of the evidence that the defendant was guilty of negligence in the respect charged in the complaint,

and the respect to which I have called your attention, that is, in not keeping the place or the instrumentality with which the deceased was called upon to render his service, in a reasonably safe condition; as to that the burden is upon the plaintiffs. Upon the other hand, when a defendant comes in, relying upon the defense of contributory negligence, or assumption of risk, the burden is upon the defendant to establish by a like preponderance of the evidence the existence of the facts constituting such contributory negligence or assumed risk, unless such contributory negligence or assumed risk already appears from the plaintiff's testimony.

It is another rule of law that a person is presumed to have a due regard for his own safety, and that presumption goes to the extent of establishing a prima facie case in the absence of evidence to the contrary, that one who was injured did not himself negligently or willfully cause the injury. It is somewhat kindred to the rule I have already stated to you in regard to the burden of the proof. Of course, this presumption may be overcome by the facts and circumstances in the case, by the evidence, direct or indirect, by inferences which are properly drawn from the evidence, and while there is a presumption here, to which I have called your attention, that Mr. Witkouski did not wilfully or negligently do that as a result of which lost his life, that isn't conclusive. You may infer from all of the circumstances and all of the testimony, direct or indirect, that he was negligent. In that connection you may take into consid-

eration such motives or incentives as the deceased may have had, if any, for being careless or for taking chances, if the evidence discloses such motives. It was claimed by the defendant in the course of the argument that he was anxious to get ahead, that he was in a hurry, and was pushing the work, and that there was some bonus that the men were working for, and that therefore he was more ready to take a chance that he otherwise would be. You may consider the evidence in so far as it justifies such an inference or does not justify it. Consider all of the facts and circumstances, and say whether or not the defendant has overcome this presumption of due care.

As I have already explained to you, you are the sole judges of the weight and credibility of the testimony of the several witnesses, and in determining the credibility to be given to the testimony of any witness you have a right to take into consideration his interest, if any, in the result of the case, his feelings in the matter, his demeanor upon the witness stand, his candor or lack of candor, and all other facts and circumstances which would influence you out of court in determining whether or not a man has told the truth. Bring to bear your own common experience and common sense in weighing the testimony and in passing upon the credibility of the witnesses.

As I have already stated to you, you may disregard any views which I have expressed as to the weight of the evidence or of the facts. I have not intended to influence you, and do not wish to influence you in any way. I have referred to the facts and the issues

only that I might assist you in applying the principles of law, to make the statement of these principles concrete, rather than general. Upon the other hand, gentlemen, as I am leaving to you the responsibility of passing upon the facts, you should in good faith undertake to apply to the facts in the case the principles of law as I have stated them to you. A juror is neither a good juror nor a good citizen who is unwilling to do that. It is fundamental to our governmental system and our system of administering justice. It is not the right of any juror to go to the jury room and say that he isn't satisfied with the explanation of the law that the court has given, and decline to apply it or follow it. If you make a mistake as to the facts, that responsibility is upon you. If I make a mistake as to the law, the responsibility is on me, and there is a remedy; it may be corrected by presenting my action to a higher court. So that you should in good faith undertake to apply the instructions I have given to you, in their letter and spirit, so far as you are able to understand them.

Now if you should find for the plaintiffs upon these general issues, that is, that they are entitled to recover at all, it will be your duty to assess the amount of damages which you believe from all of the evidence they are entitled to. You have a right to take into consideration the earning power of the deceased at the time of his death, what pecuniary loss, if any, has been suffered and will in the future be suffered, if any, by the plaintiffs, by reason of his death. You cannot allow anything on account of sympathy mere-



ly. Those are distressing circumstances, but the law cannot compensate for those things. But you may take into consideration the loss, if any, which the minor children have suffered and will in the future, in all reasonable probability, suffer, up to the time of their arriving at the age of majority, that is, up to the time of twenty-one years. I doubt not that counsel's suggestion in his last argument, of going at this in a mathematical way, was an inadvertence, and not intentional, but of course you couldn't consider the relation of a father to these children for the balance of his life according to the expectancy, because the children would have no demand, or right to demand, anything from the father after they had reached the age of majority, the age of twenty-one years. You have a right to consider, as I was saying, the reasonable probability of what loss the children will have suffered up to the time they may reach their age of majority, by reason of the loss of fatherly advice which the deceased might have given them, his direction, his influence, the education which he might have been able and been willing to provide, as well as any pecuniary loss which they have suffered or the widow has suffered, and which in all reasonable probability they will suffer in the future, the children up to the time of their arriving at the age of their majority, and you may take into consideration the reasonable expectation in years that he, the deceased, in all reasonable probability, would have lived if he had not been killed by such accident, the reasonable expectation of his earning power, wheth-



er it would have been more or less than just at the present time, and such use of the same, in whole or in part, as you think he would have made thereof for the benefit of the children and of his widow. In making such estimate, gentlemen, you can not refer to any hard and fast rule or any specific standard. The law has not attempted to prescribe a measure or a standard, but has wisely left that to the good sense of twelve men, of the jury primarily, of the court, to determine, in the light of their experience, their knowledge of human life and human relations, to say in this case what the pecuniary loss to these two children and to this widow has been and will be by reason of the unfortunate death of Mr. Witkouski.

When you have agreed upon your verdict, if you do agree upon one, your foreman will sign it. In the one case the form of verdict merely provides a finding for the defendant. You have nothing to do but sign that one. And in the other case, should you find for the plaintiffs, you will use the form where a place is left for the insertion of the amount. After you have agreed upon the amount, if you do so agree, you will enter it in this place, and then your foreman will sign it. It is necessary that you all concur in finding a verdict. It is further necessary that you avoid a resort to chance or lot in determining the amount of the verdict, if you find in favor of the plaintiff.

Let the bailiff come forward and be sworn.

MR. WAYNE: If Your Honor please, after the

retirement of the jury shall I then take my exceptions to the instructions?

THE COURT: Yes.

(The bailiff was thereupon sworn.)

THE COURT: Gentlemen, you may retire temporarily. I may recall you after hearing the suggestions from both sides, and I may not. If I do not recall you, I will send in to your room by the bailiff the exhibits. You may retire.

(The jury thereupon retired from the court room.)

MR. WAYNE: If Your Honor please, I now desire to object and save exceptions to the following certain portions of the charge and instructions of the court to the jury:

1. To that portion of the charge wherein the court in substance and effect instructed the jury that if they believed that the duty being performed at this time in the way of tightening or loosening that nut was one which was performed by the hoist man as an employe of the mechanical, as distinguished from the operating, department, that then the hoist man would not be a fellow servant of Witkouski, the deceased, for the reason that it leaves out of consideration the question as to whether or not, by virtue of the entire crew being at that time engaged in the common employment of re-winding the cable, they had all become for that time fellow servants employed in the mechanical department.

2. We except to the requested instruction which Your Honor gave—I don't suppose you number them—that "If you find from the evidence

that the witness Lytton, who was the hoist man on the shift immediately preceding him, was under the direction and exclusive command and authority of the master mechanic or general foreman, or both, and that Witkouski had no authority over or right to give orders to or direct said Lytton as to the matters and things incident to or pertaining to keeping said hoist in a reasonably safe condition of repair and efficiency, and the said Lytton, when he went off shift, left the same in an unsafe condition of repair and efficiency, without notifying the succeeding engineer, Egbert, of such condition, and that his failure to so notify said Egbert was the proximate cause, or contributed to the death of the deceased Witkouski, then you should find for the plaintiffs," etc. It was not necessary, in order to make fellow servants of Witkouski and Lytton that Lytton, the hoist engineer on a different shift, should have been under the authority of Witkouski, and of course there is no claim that men on other shifts were under his supervision. Egbert was the hoist man on his crew, and Lytton was the hoist man on the other crew.

THE COURT: Right there, I don't believe I quite understand your position, Mr. Wayne. Wouldn't the instruction be, if anything, unduly favorable to you there? That is, if I understand your contention, it would be that Lytton would not under any circumstances be a fellow servant.

MR. WAYNE: I don't read it that way: "And that Witkouski had no authority over or right to give orders to or direct said Lytton as to the matters and

things incident to or pertaining to keeping said hoist in a reasonably safe condition of repair and efficiency."

THE COURT: As I understand, your position is, that whether Lytton was in the mechanical department or not, being on a preceding shift, he was not a fellow servant with Witkouski.

MR. WAYNE: He would be.

THE COURT: He would be, whether in the mechanical department or not?

MR. WAYNE: Yes.

THE COURT: In other wards, if he was acting for the mechanical department, but on another shift, he would be a fellow servant with Witkouski, even though Witkouski was not acting in the mechanical department?

MR. WAYNE: For the time being, they were all acting in the mechanical department. But the part I object to is the statement with regard to any authority Witkouski may have had over the engineer Lytton. There was no contention in the evidence that he did have any such authority, and it was not necessary, to make fellow servants of them, that he should have. He might have authority over Egbert, the engineer working under him on the same shift, but certainly not over an engineer or hoist man working on the other shift.

MR. PLUMMER: How can you complain then?

MR. WAYNE: I complain of it as being an erroneous construction as to the law.

THE COURT: I think I see your point.



MR. WAYNE: I have then one other exception.

THE COURT: Very well.

MR. WAYNE: The other objection and exception is to that portion of the charge which I think was given of the Court's own motion, which in substance and effect advised the jury that the burden was upon the defendant to show that the risk was an assumed risk, for the reason that the law, as we understand it to be, is that the action of negligence is based not on negligence in the abstract, but upon actionable negligence, and actionable negligence is such as negatives the idea that the risk through which the servant was injured was not one which he assumed.

THE COURT: In other words, the burden is upon the plaintiff of pleading and proving that he is free from assumed risk?

MR. WAYNE: Yes, proving actionable negligence, negligence of the master himself, and in such a particular as not to lay the servant open to the charge of having assumed the risk of that particular agency.

THE COURT: I doubt whether the jury was misled by this instruction, but upon its analysis, in the light of the suggestions of Mr. Wayne, I am inclined to think that perhaps it may be technically erroneous.

MR. PLUMMER: I would suggest that if there is any doubt about it you recall the jury and give them proper instructions.

THE COURT: Yes. I was just seeing about what I could —



MR. WAYNE: I should think about as good a way as any would be to cut out that part.

THE COURT: You may call in the jury, Mr. Bailiff.

(The jury was thereupon returned into court.)

THE COURT: Gentlemen, my attention has been directed to what I am inclined to think was an inaccuracy in a requested instruction which I gave to you. You will remember that after explaining to you somewhat at length what the issues are, and the general principles of law, and undertaking to apply them to the facts, I stated to you in substance that, to sum up, and perhaps to put the same principles in other words, I would give you another instruction, and thereupon I read from a paper which I held in my hand. I think the instruction which I read to you was somewhat inaccurate, and I have modified it so as to read thus, substantially:

If you find from the evidence that the witness Lytton, who was the hoist man upon the shift immediately preceding Egbert, and Egbert were under the direction and exclusive command and authority of the master mechanic or general foreman, or both, and that the deceased, and other pushers, as they are called, that is, occupying the same position that he did, with other shifts or crews, and you further find that Witkouski, the deceased, and other pushers, had no authority over or right to give orders to or direct said hoist men as to matters and things incident to or pertaining to keeping said hoist in a reasonably safe con-

dition of repair and efficiency, and that said Lytton, when he went off shift, left the same in an unsafe condition of repair and efficiency, without notifying the succeeding engineer, Egbert, of such condition, and that such conduct on his part was negligence contributing to or causing the injury, and his act in so leaving the screw and failing to notify Egbert constituted the proximate cause or contributed to the death of the deceased, then you should find for the plaintiffs, unless you further find that Witkouski knew or had reason to believe in the existence of the mechanical conditions which did exist, and which consiituted the defective conditions of the hoist, and was further able to appreciate the risk incident to such condition, and notwithstanding such knowledge or information, and such ability to appreciate the risk, attempted to ride down upon the bucket, when the hoist was in such defective condition.

Gentlemen, I have cut out from the general rules such rules as were offered in evidence. They are upon this little slip here. That was by agreement of counsel, that it should be eliminated from the rules which were not introduced. The photographs and also this map are here. I think these were the only exhibits. You may take them with you. You may now retire with the bailiff.

(The jury thereupon retired from the court room with the bailiff.)

*In the District Court of the United States for the  
District of Idaho, Northern Division.*

Bertha D. Witkouski, in her own behalf, and as  
Guardian ad Litem of the persons and inter-  
ests of Charles Witkouski and Eugene Wit-  
kouski, minors,

*Plaintiffs,*

vs.

Consolidated Interstate-Callahan Mining Com-  
pany, a corporation,

*Defendant.*

No. 657.

VERDICT.

We, the jury in the above entitled cause, find for  
the plaintiffs and assess their damages against the  
defendant in the sum of \$15,000 Fifteen Thousand.

ARCHIE A. GALLEN,

Foreman.

Filed Nov. 25, 1916.

W. D. McReynolds, Clerk.

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And comes now the defendant, Consolidated Inter-  
state-Callahan Mining Company and serves, pre-  
sents and files the foregoing as and for a full, true  
and correct Bill of Exceptions of all rulings made at  
and during the course of the trial of the above enti-  
tled action in the above entitled Court, which said  
rulings were duly objected and excepted to by the  
defendant upon the grounds mentioned therein, said  
exceptions being accompanied with the whole evi-  
dence in said case, the same being necessary to ex-

plain the said exception, and each and every one of them, and their, and each and every of their, relation to the case and to show that the said rulings, and each and every of them, tended to prejudice the rights of the said defendant.

Dated at Wallace, Idaho, this 6th day of January, A. D. 1917.

JAMES A. WAYNE,  
*Attorney for Defendant.*

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*In the District Court of the United States for the  
District of Idaho, Northern Division.*

Bertha D. Witkouski; and Charles F. Witkouski  
and Eugene D. Witkouski, minors by Bertha  
D. Witkouski, their guardian ad litem,  
*Plaintiffs,*

vs.

Consolidated Interstate-Callahan Mining Com-  
pany, a corporation,

*Defendant.*

I, Frank S. Dietrich, Judge of the District Court of the United States for the District of Idaho, Northern Division, as the Judge who presided in said Court at the trial of the case of Bertha D. Witkouski; and Charles F. Witkouski and Eugene D. Witkouski, minors, by Bertha D. Witkouski, their guardian ad litem vs. Consolidated Interstate-Callahan Mining Company, a corporation, tried in said Court on the 24th day of November, A. D. 1916, and ending on the 25th day of November, A. D. 1916, do hereby certify that the foregoing Bill of Exceptions was handed



me by the Clerk of the Court on the . . . day of January, A. D. 1917, for settlement and it appearing to me that the same has been within the time allowed by law, and within the time allowed by an order of this Court extending such time, served upon the attorneys for the plaintiff, together with notice that the same would be presented for settlement, and the attorneys for the plaintiff having made no objection to the settlement, and having offered no amendments thereto, and it appearing to me that the said Bill of Exceptions is correct and contains in substance all of the evidence offered at the trial of said cause, excluding exhibits which are separately certified and the instructions given by the Court herewith and all the exceptions taken by the defendant to the admission of testimony and to the giving and refusal to give instructions to the jury, the said Bill of Exceptions is hereby signed, sealed, settled and allowed as and for a full, true and correct Bill of Exceptions in this cause, and I hereby certify that the same with the exhibits separately certified be made a part hereof contains all of the evidence produced at the trial. The Clerk is hereby directed to certify to the said exhibits as being a part of this Bill of Exceptions,

Dated at Boise, Idaho, this 12th day of April, A. D. 1917.

FRANK S. DIETRICH,  
*Judge.*



*In the District Court of the United States for the  
District of Idaho, Northern Division.*

Bertha D. Witkouski; and Charles F. Witkouski  
and Eugene D. Witkouski, minors by Bertha  
D. Witkouski, their guardian ad litem,  
*Plaintiffs,*

vs.

Consolidated Interstate-Callahan Mining Com-  
pany, a corporation,  
*Defendant.*

NOTICE.

To Bertha D. Witkouski; and Charles F. Witkouski and Eugene D. Witkouski, minors, by Bertha D. Witkouski, their guardian ad litem, and to Mr. Therrett Towles and W. H. Plummer, attorneys for plaintiffs:

You and each of you will please take notice that the foregoing bill of exceptions, complete in 222 pages, will be presented to the Honorable Frank S. Dietrich, Judge of the District Court of the United States for the District of Idaho, Northern Division, for settlement as a full, true and correct bill of exceptions in this case.

JAMES A. WAYNE,  
Attorney for Defendant.

*In the District Court of the United States for the  
District of Idaho, Northern Division.*

Bertha D. Witkowski; and Charles F. Witkowski  
and Eugene D. Witkowski, minors by Bertha  
D. Witkowski, their guardian ad litem,  
*Plaintiffs,*

vs.

Consolidated Interstate-Callahan Mining Com-  
pany, a corporation,

*Defendant.*

Service of the defendant's proposed bill of excep-  
tions in the above entitled action is hereby accepted  
and the receipt of a true and correct copy thereof  
admitted at Wallace, Idaho, this 6th day of January,  
A. D. 1917.

THERRET TOWLES,

Residence and Post Office address, Wallace, Idaho.

W. H. PLUMMER,

Residence and Post Office address, Spokane, Wash-  
ington.

*Attorneys for Plaintiffs.*

Lodged January 9, 1917.

W. D. McReynolds, Clerk.

Filed April 13, 1917.

W. D. McReynolds, Clerk.

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(Title of Court and Cause.)

No. 657.

PETITION FOR WRIT OF ERROR.

Comes now Consolidated Interstate-Callahan Min-  
ing Company, a corporation, defendant herein, and

says that on or about the 25th day of November, A. D. 1916, this Court entered judgment herein in favor of the plaintiffs and against the defendant, in which judgment and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

WHEREFORE, this defendant prays that a writ of error may issue in its behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

JAMES A. WAYNE,  
*Attorney for Defendant.*

Residence and Post Office Address:

Wallace, Idaho.

Filed Apr. 16, 1917.

W. D. McReynolds, Clerk.

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(Title of Court and Cause.)

No. 657.

### ASSIGNMENT OF ERRORS.

The above named defendant, in support of its petition for a writ of error in the above entitled cause, makes the following assignment of errors which it avers were committed by the Court in the rendition of the judgment against this defendant appearing upon the record herein, to-wit:

## I.

The trial court erred in overruling and denying defendant's motion for a non-suit made herein at the close of the testimony introduced in behalf of the plaintiffs, because the evidence introduced by said plaintiffs was insufficient to make out a case for the jury, in each of the following particulars and for each of the following reasons, to-wit:

(a) The plaintiffs failed to prove any of the charges of negligence set forth in their complaint. It was alleged in the complaint and sought to be proven upon the trial that the defendant was negligent (1) in employing a hoistman, Joe Egbert, who was incompetent, inexperienced, nervous and excitable, and which facts were known to the defendant, and (2) in failing to furnish the deceased with a reasonably safe place for the performance of the duties required of him, and (3) in failing to furnish the deceased with proper, safe, suitable and adequate machinery, tools and appliances for the performance of the work required of him in that the bolts, lugs and keys by which the clutch was fastened to the shaft of the drum of the hoist were loose, worn out, unsafe and inadequate, and that the brake band and clutch were worn out, loose, inadequate and unsafe, and that the clutch and the band thereof could not be adjusted by said lever under the control of the hoistman so as to retard and control the speed of said hoist and prevent the same from attaining a dangerous rate of speed and from falling to the bottom of said shaft, and (4) that defendant was oper-



ating through a vertical shaft more than two hundred and fifty (250) feet in depth without having said shaft equipped with a mine cage, skip or bucket fitted with safety clutches, in violation of the state law, and (5) that the bucket was lowered at a greater speed than six hundred (600) feet per minute in violation of the state law, and (6) that a copy of the Idaho Mining code and a copy of the bell signals had not been properly posted as required by the state law, and (7) that the defendant had not promulgated proper and necessary hoist rules, and particularly a rule requiring the hoist to be raised and lowered before permitting men to be transported therein, and (8) that the defendant was negligent in not having its master mechanic make proper and reasonable inspections of the hoisting machinery and apparatus; but the evidence introduced by the plaintiffs failed to prove any single charge of negligence as set forth in said complaint and herein.

(b) Because it did appear from the evidence introduced by plaintiffs that there was no actionable negligence on the part of the defendant which was the proximate cause of the accident to the deceased complained of in plaintiff's complaint in this case.

(c) Because it appeared from the evidence that the deceased at the time of his accident was guilty of contributory negligence in, (1) in attempting to descend in the bucket before complying with the rules of the defendant requiring one round trip to be made before men were hoisted or lowered in said bucket, and (2) in descending before ascertaining



whether or not the clutch bolt had been tightened when the deceased knew, or by the exercise of reasonable care should or could have known that by reason of the work in which he and his co-laborers were engaged immediately preceding the accident, that the clutch bolt would necessarily have been loosened, and (3) in attempting to leap from said bucket after it had attained a dangerous rate of speed.

(d) Because it appears from the evidence that the instrumentalities, machinery, and apparatus furnished by the defendant were reasonably safe, adequate and in a good state of repair, and that the accident to the deceased was due to the negligence of a fellow servant, or fellow servants, in not using properly an instrumentality, machine or apparatus which was in itself reasonably safe, but which was rendered unsafe by reason of its improper use by a fellow servant, or fellow servants of the deceased; for the negligence of which said fellow servant or fellow servants the defendant was not responsible.

(e) Because it appeared by the evidence that the deceased knew, or by the exercise of reasonable care and prudence could or should have known and appreciated, the risk to which he was subjected at the time of his accident, (1) because of his knowledge of the work which was being performed immediately preceding his accident and his knowledge of the manner in which such work was customarily performed, and (2) because he had been advised and informed by the hoistman Lytton that the clutch bolt had been loosened by the men that preceded the

deceased and his crew in the work of removing the kinks from the cable, and that deceased therefore assumed such risks, and that his accident resulted from an assumed risk.

(f) Because it appeared from plaintiff's complaint and the evidence adduced in behalf of the plaintiffs that there was no actionable negligence on the part of the defendant which served as the proximate cause of the accident to the deceased.

(g) Because it affirmatively appeared from the evidence introduced by the plaintiffs that the defendant had performed its full duties of furnishing the deceased with a reasonably safe place to work, with reasonably safe instrumentalities with which to work, with competent co-servants, had promulgated proper and reasonably adequate rules, and had inspected with reasonable frequency and regularity and with reasonable thoroughness the instrumentalities so furnished by it, and had not failed in the discharge of any duty which it owed the said deceased.

## II.

The trial court erred in overruling and denying defendant's motion for a non-suit renewed at the close of all of the testimony and upon the same grounds that the original motion for non-suit was made, and also in overruling defendant's motion for a directed verdict for defendant upon the same and additional grounds at the close of the whole testimony, because in addition to the grounds and reasons hereinbefore specified, the evidence was insufficient to warrant the submission of the case to the jury, or

a recovery by the plaintiff of any sum whatever, in the following particulars:

(a) Because it appeared from all the evidence in the case that the deceased assumed every risk, and the risk of every defect mentioned in the complaint and mentioned in the evidence as grounds of negligence, and that he knew and appreciated and assumed every risk growing out of the several grounds of negligence set forth in said complaint.

(b) Because it appeared from all the evidence that the deceased met with his accident solely and entirely by reason of his own negligence, or his contributory negligence.

(c) Because it appeared from all of the evidence that if the accident was not due to the negligence of the deceased himself, it was due to the negligence of a fellow servant or fellow servants whose negligence was one of the risks assumed by the deceased and for which negligence the defendant is not liable.

(d) Because the evidence in its entirety failed to prove any actionable negligence on the part of the defendant which served as the proximate cause of the accident to the deceased.

### III.

The court erred in giving the following portion of his oral instructions to the jury, to-wit:

“In other words, one who is charged with the duty of performing what it is the master’s duty to do, here the defendant company’s duty to do, of keeping the mine in safe condition, or the instrumentalities in safe condition, cannot be a

fellow servant or employe with another, so that in this case if you find that the accident was the result of the negligence of some one who was acting for or in the mechanical department, rather than the operating department, then that is a risk from another employe of the defendant company which the deceased did not assume. He assumed risks from the negligence of fellow employes when those employes were in his department, the mining department, rather than the mechanical department.

#### IV.

The court erred in giving the following portion of his oral instructions to the jury, to-wit:

“And I have to say to you that the evidence very strongly tends to show that the condition of this screw or bolt, or nut is the proximate cause of the injury, or the accident, rather, and is the only immediate cause of the accident. There is some evidence tending to show that the shaft of the drum was sprung. However, the plaintiffs do not allege, and, as I understand, do not claim now, that this sprung condition of the shaft, even if you credit that testimony, directly contributed to the accident. That was brought in only for the purpose of attempting to explain why it was necessary to loosen this screw, or bolt, or nut. The defendant contends that it was not sprung, and that that is not the reason for loosening the bolt or nut, and the plaintiff contends that it was. But it is not alleged, and



it is not now claimed, that the condition of the shaft of the drum in anywise affected the operation of the hoist upon the evening in question at the time the accident occurred. In other words, the clutch would not have held any better had the shaft been in perfect condition, if it was not in perfect condition. The fact, if it be a fact, that the shaft was sprung, did not in any wise affect the hoist man's control of the hoisting machinery at the time in question. There is some evidence also tending to show that certain keys were loose in and about the mechanism which controlled the clutch or had to do with the operation of the drum, but I have to say to you that there is no substantial evidence tending to show that the condition of these keys in any wise affected the hoist man's control of the hoist at that time."

## V.

The court erred in giving the following portion of his oral instructions to the jury, to-wit:

"Now then, gentlemen, if from all of the evidence you find that Mr. Witkouski did not have control of the hoist, that he was not charged with the responsibility of keeping it in repair, if he did not have the direction of the hoist man as to what should be done from time to time in seeing that the hoist operated properly, but that he could only direct him in so far as giving him the signals and telling him when the hoist should go up and go down, and how rapidly, and so forth,



and further that the hoist man, in so far as the mechanical work of keeping this hoist in condition was concerned, was under the control and direction of the mechanical department, ultimately the master mechanic, then you could not find that the hoist man is a fellow servant with the deceased, and therefore the negligence of the hoist man in loosening this screw and leaving it loose, would not be a risk that the deceased would have taken, and if he was injured as a consequence of such negligence then the plaintiffs here could recover."

#### VI.

The court erred in giving the following portion of his oral instructions to the jury, to-wit:

"You will see that the whole issue there is as to whether or not the hoist man was under the control of Witkouski so far as the mechanical work was concerned of keeping this hoist in condition, or whether he was under the control and direction of the mechanical department, and therefore was representing the master in the performance of this primary duty of keeping the appliances and instrumentalities in a proper condition of repair."

#### VII.

The court erred in giving the following portion of his oral instructions to the jury, to-wit:

"Perhaps, to sum up, and to state what I have already said to you in a somewhat different way,

if you find from the evidence that the witness Lytton, who was the hoist man on the shift immediately preceding him, was under the direction and exclusive command and authority of the master mechanic or general foreman, or both, and that Witkowski had no authority over or right to give orders to or direct said Lytton as to the matters and things incident to or pertaining to keeping said hoist in a reasonably safe condition of repair and efficiency, and the said Lytton, when he went off shift, left the same in an unsafe condition of repair and efficiency, without notifying the succeeding engineer, Egbert, of such condition, and that his failure to so notify said Egbert was the proximate cause, or contributed to the death of the deceased Witkowski, then you should find for the plaintiffs."

### VIII.

The trial court erred in entering judgment for plaintiffs and against the defendants herein for the sum of Fifteen Thousand (\$15,000.00) Dollars upon the verdict of the jury, and in entering the judgment for the amount of said verdict.

### SPECIFICATIONS WHEREIN THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE VER- DICT OF THE JURY AND JUDGMENT THEREON.

The evidence is insufficient to sustain the verdict of the jury and the judgment thereon in the following particulars and for the following reasons, to-wit:

## I.

There is no evidence that the defendant was negligent in employing and keeping in its service the hoist man operating the hoist at the time of the accident, or that said hoist man was incompetent, inexperienced, nervous, or excitable, but on the contrary the evidence affirmatively shows that said hoist man, except upon this single occasion, was a careful, prudent man.

## II.

There is no evidence that the defendant failed to furnish the deceased with a reasonably safe place to work, but on the contrary the evidence affirmatively shows that the place where deceased was called upon to perform his duties was reasonably safe.

## III.

There is no evidence that the defendant was negligent in failing to furnish to the deceased proper, safe, suitable, and adequate machinery, tools and appliances for the performance of the work required of him, or that the bolts, lugs and keys by which the clutch was fastened to the shaft of the drum of the hoist were loose, worn out, unsafe, and inadequate, or that the brake band and clutch thereon were worn out, loose, inadequate, and unsafe, or that said clutch and the band thereof could not be adjusted by said lever under the control of the hoist man so as to retard and control the speed of said hoist, but on the contrary the evidence affirmatively shows that said hoist was in a reasonably safe condition.

## IV.

There is no evidence that the shaft in which deceased was working was not equipped with a cage, skip, or bucket fitted with safety clutches, but on the contrary the evidence shows that said shaft was equipped with a proper bucket fitted with safety clutches.

## V.

There is no sufficient evidence to show that the men were lowered by the defendant into its shaft at a greater speed than six hundred (600) feet per minute, but on the contrary the evidence does show that the defendant had promulgated a rule restricting the speed to less than six hundred (600) feet per minute and that if said rule, or said law was violated, it was only upon the single occasion when the deceased met with his accident and was due to the negligence of a fellow servant.

## VI.

That there was no evidence that the defendant was negligent in not promulgating proper and necessary hoist rules and regulations, and particularly a rule requiring the hoist to be raised and lowered before permitting men to be transported therein, but on the contrary the evidence does show that such rules had been promulgated and that their non-observance upon the occasion of the accident to the deceased, if such rules were not observed at said time, was due to the negligence of the deceased himself, or to the negligence of a fellow servant.



## VII.

There is no evidence that the defendant was negligent in not having its master mechanic make proper and reasonable inspections of the hoisting machinery and apparatus, but on the contrary the evidence affirmatively shows that reasonable and proper inspections of said hoisting machinery and apparatus were required to be made and were in fact made by the defendant's master mechanic.

## VIII.

There is no evidence of any negligence on the part of the defendant which was the proximate cause of the accident to the deceased. While the evidence does disclose the fact that a short time prior to the accident to the deceased, the hoist man on the preceding shift had loosened the clutch bolt, and while there is some evidence that the loosening of this bolt was made necessary by reason of the drum on the shaft being slightly sprung, and while there is evidence tending to show that said hoist engineer had failed to tighten said clutch bolt, or report his failure to do so to the succeeding hoist man, yet the evidence affirmatively shows that said hoist could still be controlled by the hoist man by means of the proper application of the compressed air and by means of a brake provided for that purpose, and that the rapid descent of the bucket at the time of the accident was due to the failure of the hoist engineer to properly operate said hoist, and not to the sprung condition of the drum, nor to the loosened condition of such clutch bolt.



## IX.

The evidence discloses that the proximate cause of the accident to the deceased was due to the negligence of a fellow servant or servants. In this respect the evidence shows that Lytton, the hoist man on the crew preceding the crew of the deceased, had loosened the clutch bolt, and that all of the men upon said preceding crew had been engaged in the operation of taking the kinks out of the cable; that when the deceased and his crew went on shift the work of taking the kinks out of the cable had not been completed and that deceased and his crew continued the work of the preceding crew; the evidence shows that all of the men on both of these crews were, as a matter of law, fellow servants, and that whether the proximate cause of the injury was (as stated by the trial court) the loosening of the clutch bolt and the failure to tighten the same, or was the careless operation of said hoist by the hoist engineer, that in either case the negligence which served as the proximate cause for the injury was the negligence of a fellow workman.

## X.

The evidence discloses that the deceased had on other occasions assisted in taking kinks out of the cable and knew that it was customary to loosen the clutch bolt to permit of the easier unwinding of the cable; the deceased knew that this had been done when he went to work on the night of his accident; the evidence discloses that without enforcing the rule which required the hoist to be lowered and raised

before permitting the men to be carried thereon, and without ascertaining whether the clutch bolt had been tightened, the deceased with his men stepped upon the bucket and ordered the lowering thereof; and the evidence shows that in doing so the deceased assumed the risk and every risk of descending in the bucket under the above mentioned conditions and circumstances.

## XI.

And for the same reasons and in the same particulars as mentioned in the last foregoing specification, the deceased was guilty of contributory negligence in descending in said bucket under the conditions mentioned in the last foregoing specification, and the evidence further discloses that the deceased had been warned that said clutch bolt had been loosened and was therefore guilty of gross negligence in descending in said bucket without ascertaining whether or not the said clutch bolt had been tightened.

And the evidence further discloses the fact that the men who remained on the bucket were not injured and that the accident to the deceased was due to his negligence in leaping from said bucket.

Comes now the defendant in this action and in connection with its petition for a writ of error makes and proposes and files the foregoing assignment of errors which it avers occurred upon the trial of the said cause, together with its specifications wherein the evidence is insufficient to sustain the verdict or

judgment thereon, and prays that because thereof the judgment in the District Court may be reversed.

JAMES A. WAYNE,

*Attorney for Defendant.*

Filed Apr. 16, 1917.

W. D. McReynolds, Clerk.

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(Title of Court and Cause.)

No. 657.

ORDER ALLOWING WRIT OF ERROR.

On this 16th day of April, 1917, came the defendant by its attorney, and filed herein and presented to the Court its petition praying for the allowance of a writ of error, an assignment of errors intended to be urged by it, praying also that the transcript of the record and proceedings, and papers upon which the judgment herein is rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and that such other and further proceedings may be had that may be proper in the premises.

On consideration whereof the Court does allow the writ of error upon the defendant giving bond according to law in the sum of Seventen Thousand (\$17,000.00) Dollars which shall operate as a super sedes bond.

FRANK S. DIETRICH,

Judge of the United States District  
Court, for the District of Idaho.

Filed Apr. 16, 1917.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 657.

## BOND ON WRIT OF ERROR.

*Know All Men By These Presents*, That we, Consolidated Interstate-Callahan Mining Company, a corporation, as principal, and The Aetna Accident and Liability Company, a corporation organized and existing under and by virtue of the laws of Connecticut, having complied with all of the statutes of the United States authorizing it to become a surety on bonds in the courts of the United States, as surety, are held and firmly bound unto the defendants in error, Bertha D. Witkouski; and Charles F. Witkouski, and Eugene D. Witkouski, minors, by Bertha D. Witkouski, their guardian ad litem, in the full and just sum of Seventeen Thousand (\$17,000.00) Dollars, to be paid to the said defendants in error, Bertha D. Witkouski; and Charles F. Witkouski, and Eugene D. Witkouski, minors, their certain attorneys, executors, administrators, or assigns; to which payment well and truly to be made we bind ourselves, our successors and assigns jointly and severally by these presents.

Sealed with our seals and dated this 14th day of April, A. D. 1915.

*Whereas*, Lately at a session of the District Court of the United States for the District of Idaho, Northern Division, in a suit pending in said court between Bertha D. Witkouski; and Charles F. Witkouski, and Eugene D. Witkouski, minors, by Bertha D. Witkouski, their Guardian ad Litem, as plaintiffs



and Consolidated Interstate-Callahan Mining Company, a corporation, as defendant, a judgment was rendered against the said Consolidated Interstate-Callahan Mining Company, upon a verdict of the jury in the sum of Fifteen Thousand (\$15,000.00) Dollars, and costs amounting to the sum of \$209.35.

*And Whereas*, The said defendant, Consolidated Interstate-Callahan Mining Company, considering it is aggrieved thereby, has obtained from the said court a writ of error to reverse and correct said judgment in that behalf, and a citation directed to the said plaintiffs, Bertha D. Witkouski; and Charles F. Witkouski and Eugene D. Witkouski, minors, citing and admonishing them to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the City of San Francisco, in the State of California;

*Now*, The condition of the above obligation is such, that, if the said Consolidated Interstate-Callahan Mining Company shall prosecute the said writ of error to effect, and answer all damages and costs if it fails to make the said plea good in said court, then the above obligation to be void, otherwise to remain in full force and virtue.

This bond is intended as a bond for costs on appeal and as a supersedeas bond.

THE AETNA ACCIDENT AND  
LIABILITY COMPANY,

(Seal.)

By Herman J. Rossi, Resident Vice President.  
Attest: R. Myers, Resident Assistant Secretary.  
(Duly verified.)



The foregoing bond is hereby approved this 16th day of April, 1917, and the same when filed shall operate as a bond for costs on appeal and as a super-sedeas bond.

FRANK S. DIETRICH,

Filed Apr. 16, 1917.

Judge.

W. D. McReynolds, Clerk.

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(Title of Court and Cause.)

PRAECIPE.

*To Mr. W. D. McReynolds, Clerk of the United States  
District Court, Boise, Idaho:*

Dear Sir:

You will please prepare transcript in the above entitled cause and include therein,

1. Writ of Error and Citation, Appeal Bond, Assignment of Errors and all other papers relating to this writ of error.

2. Judgment Roll.

3. Bill of Exceptions.

4. Copy of the Journal Entries.

And in the Judgment Roll you will please include

1. Complaint.

2. Demurrer to Complaint.

3. Answer.

4. Verdict.

5. Judgment.

JAMES A. WAYNE,

*Attorney for Defendant.*

Residence and P. O. Address, Wallace, Idaho.

Filed Apr. 16, 1917.

W. D. McReynolds, Clerk.

*In the District Court of the United States for the  
District of Idaho, Northern Division*

Bertha D. Witkouski; and Charles F. Witkouski,  
and Eugene D. Witkouski, minors, by Bertha  
D. Witkouski, their Guardian ad Litem,  
*Plaintiffs,*

vs.

Consolidated Interstate-Callahan Mining Com-  
pany, a corporation, *Defendant.*

No. 657.

### WRIT OF ERROR

The United States of America,  
Ninth Judicial District Circuit,—ss.

*The President of the United States, to the Honorable  
Judge of the District Court of the United States,  
for the District of Idaho, Greeting:*

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court before you, or some of you, between Bertha D. Witkouski; and Charles F. Witkouski, and Eugene D. Witkouski, minors, by Bertha D. Witkouski, their Guardian ad Litem, Plaintiffs, and Consolidated Interstate-Callahan Mining Company, a corporation, Defendant, a manifest error hath happened, to the great damage of the said Consolidated Interstate-Callahan Mining Company, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and open-

ly, you send the record and proceedings aforesaid, with the things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you may have the same at San Francisco, California, in said Circuit on the 16th day of May, next, in the said Circuit Court of Appeals to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, this 16th day of April, A.D. 1917, and in the (141) one hundred and forty-first year of the Independence of the United States of America.

Allowed by: FRANK S. DIETRICH,  
*United States District Judge.*

Attest: W. D. McREYNOLDS,  
*Clerk of the District Court of the  
United States, District of Idaho.*

Filed April 16, 1917. W. D. McReynolds, Clerk.

*In the District Court of the United States for the  
District of Idaho, Northern Division*

Bertha D. Witkouski; and Charles F. Witkouski,  
and Eugene D. Witkouski, minors, by Bertha  
D. Witkouski, their Guardian ad Litem,  
*Plaintiffs,*

vs.

Consolidated Interstate-Callahan Mining Com-  
pany, a corporation, *Defendant.*

No. 657.

CITATION ON WRIT OF ERROR

*To Bertha D. Witkouski; and Charles F. Witkouski,  
and Eugene D. Witkouski, by Bertha D. Witkou-  
ski, their Guardian ad Litem:*

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, California, in said Circuit, on the 16th day of May, next, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Idaho, Northern Division, wherein Consolidated Interstate-Callahan Mining Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the said judgment rendered against the said plaintiff in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable FRANK S. DIETRICH,  
District Judge of the United States District Court

at Boise, Idaho, within said circuit, this 16th day of April, in the year of our Lord one thousand nine hundred and seventeen and of the Independence of the United States of America the one hundred and forty-first.

FRANK S. DIETRICH,  
*United States District Judge.*

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RETURN TO WRIT OF ERROR

And thereupon it is ordered by the Court that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

Attest: W. D. McREYNOLDS,  
(Seal.) *Clerk.*

We hereby, this 11th day of May, 1917 accept personal service of this citatio non behalf of Bertha D. Witkouski; and Charles F. Witkouski, and Eugene D. Witkouski, minors, by Bertha D. Witkouski, their Guardian ad Litem, Appellees.

THERRETT TOWLES,  
*Attorney for Appellees.*

Filed April 16, 1917. W. D. McReynolds, Clerk.

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(Title of Court and Cause.)

CLERK'S CERTIFICATE

I, W. D. McReynolds, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages



numbered from 1 to 303, inclusive, to be full, true and correct copies of the pleadings and proceedings in the above entitled cause, and that the same, together constitute the transcript of the record herein upon Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the record herein amounts to the sum of \$353.35, and that the same has been paid by the Plaintiff in Error.

Witness my hand and the seal of said court this 12th day of May, 1917.

W. D. McREYNOLDS,

(Seal.)

*Clerk.*



No. 2993

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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CONSOLIDATED INTERSTATE - CALLAHAN  
MINING COMPANY, a Corporation,

*Plaintiff in Error,*

VS.

BERTHA D. WITKOUSKI, ET AL,

*Defendants in Error.*

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Supplemental  
Transcript of the Record

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*Upon Writ of Error from the United States District  
Court for the District of Idaho, Northern*

*Division.*

Filed

JUL 5 - 1917

F. D. Monckton



No. ....

**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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CONSOLIDATED INTERSTATE - CALLAHAN  
MINING COMPANY, a Corporation,  
*Plaintiff in Error,*

vs.

BERTHA D. WITKOUSKI, ET AL,  
*Defendants in Error.*

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**Supplemental**  
**Transcript of the Record**

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*Upon Writ of Error from the United States District  
Court for the District of Idaho, Northern  
Division.*





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*In the District Court of the United States for the  
District of Idaho, Northern Division.*

BERTHA D. WITKOUSKI, and CHARLES F.  
WITKOUSKI and EUGENE D. WITKOUSKI,  
minors, by Bertha D. Witkouski, their Guardian  
Ad Litem, Plaintiffs,

vs.

CONSOLIDATED INTERSTATE - CALLAHAN  
MINING COMPANY, a Corporation,  
Defendant.

No. 657.

### PETITION FOR A NEW TRIAL.

Comes now the defendant above named and petitions the above entitled court to set aside and vacate the verdict rendered by the jury in said cause for the sum of Fifteen Thousand (\$15,000.00) Dollars, and the judgment entered thereon, which verdict was rendered on the 25th day of November, 1916, and judgment entered thereon on November 25th, 1916, and to grant a new trial in said cause upon each of the following grounds:

#### I.

Accident or surprise which ordinary prudence could not have guarded against.

#### II.

Newly discovered evidence, material for the petitioner herein, which it could not with reasonable diligence have discovered and produced at the trial.

#### III.

Excessive damages appearing to have been given under the influence of passion and prejudice.

IV.

Insufficiency of the evidence to justify the verdict.

V.

That the verdict is against law.

VI.

Error in law occurring at the trial.

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SPECIFICATIONS OF ERRORS IN LAW OC-  
CURRING AT THE TRIAL AND RELIED  
UPON IN THIS PETITION.

(a) Error of the Court in denying defendant's motion for a non-suit.

(b) Error of the Court in denying defendant's motion to direct a verdict for the defendant which motion was made at the close of all the evidence.

(c) Error of the Court in instructing the jury that whether or not the hoistman Joe Egbert and the hoistman J. H. Litten, or either or both of them, was a fellow servant, or were fellow servants of the deceased, Charles Witkouski, was a question of fact for them to determine under the evidence, and if they found that either or both of said hoistmen were not fellow servants of the deceased, that then they could find a verdict in favor of the plaintiffs.

(d) Error of the Court in instructing the jury that whether or not the proximate cause of the accident to the deceased, (to-wit, the loosening of the nut upon the clutch bolt of the hoist, or the failure to tighten said nut, or both the loosening of, and the



failure to tighten, said nut), was the act or the negligence, or the negligent act, of a fellow servant, or fellow servants, of the deceased, was a question of fact for them to determine under the evidence and that if they found that said act or acts, or negligence of a fellow servant, or fellow servants, of the deceased, was the proximate cause of said accident that then they could find a verdict in favor of the plaintiffs.

(e) Error of the Court in instructing the jury that they might determine under the evidence in this cause whether or not the proximate cause of the accident to the deceased was the act, or acts, or the negligence, of a fellow servant, or fellow servants.

(f) In instructing the jury that they might determine under the evidence in this case whether or not the deceased assumed the risk or risks by reason of which the accident occurred.

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SPECIFICATION OF PARTICULARS WHERE-  
IN THE EVIDENCE IS CLAIMED TO  
BE INSUFFICIENT.

The defendant contends that under the evidence in this case and the charge of the Court it was established by uncontroverted evidence that the proximate cause of the accident to the deceased was the loosening of a nut upon the clutch bolt of the hoist in course of the operation of which the accident occurred, and that said accident was not caused, or contributed to, by any negligence of the defendant in failing to provide the deceased with a reasonably

safe place to work, with reasonably safe tools, appliances, instrumentalities, and machinery, or with reasonably adequate machinery and appliances for the doing of the work in the progress of which the accident occurred, or by its failure to use reasonable care in the inspection of said machinery, appliances and instrumentalities, or to keep said machinery, instrumentalities and appliances in a reasonably safe condition of repair. That there is no evidence that the hoist in use was inadequate, or unsafe for the work in which it was being used, or that it was defective or out of repair; but on the contrary the evidence did disclose that said hoist was adequate, safe and in a reasonably safe condition of repair immediately before said accident, at the time of said accident, immediately after said accident, and so far as the evidence discloses, at all times. That there is no evidence as to how often a hoist of the kind, character and description in use at defendant's mine should be inspected; that there is evidence that said hoist was inspected each day prior to said accident, that it was inspected within from twenty-four to thirty hours immediately preceding said accident; and that there is no evidence that the methods of inspection, or the length of time between which inspections were made, or the length of time preceding the accident within which an inspection was, or inspections were, made were inadequate, insufficient, unreasonable, or not a complete discharge of defendant's duty of reasonable care. That there is no evidence that any reasonable inspection which the defendant was required under

the law to make would have disclosed to it the condition through and by reason of which said accident occurred; but on the contrary the evidence does disclose that unless the defendant had made constant inspections of said hoist, at all times, it could not have prevented said accident. That there is no evidence that any likelihood or probability of the hoistman Litten loosening said nut upon the clutch bolt, or of the hoistmon Egbert, or the hoistman Litten failing to advise the succeeding shift of the fact that he had loosened and failed to tighten said nut, or of the hoistman Egbert operating said hoist without first tightening said nut, would have been discovered by any reasonable inspection at any time when it was the duty of the defendant to inspect, or at any other time prior to the time of said accident. That there is no evidence that there was any negligence on the part of the defendant in the matter of inspection; but on the contrary the evidence does affirmatively show that defendant had fully performed and discharged its entire duty of inspection. That there is no evidence that the defendant's failure to inspect was the proximate cause of the accident. That there is no evidence of any failure on the part of the defendant to repair said hoist or to keep said hoist in a reasonably safe condition; but on the contrary the evidence does establish the fact that said hoist was in a reasonably safe condition and that no repairs thereon were necessary or needed at the time of said accident. That there is no evidence that a failure to properly repair said hoist or to keep the said

hoist in a reasonably safe condition was the proximate cause of the accident.

The defendant further contends that it is alleged in plaintiffs' complaint herein that the defendant had been negligent and had failed to use reasonable care in this, that the said defendant had failed to furnish the deceased with a reasonably safe place for the performance of the duties required of him, had failed to furnish the deceased with proper, safe, suitable and adequate machinery, tools and appliances for the performance of the work required of him in that the bolts, lugs, or keys by which the clutch was fastened to the shaft of the drum of said hoist were loose, worn out, unsafe and inadequate, and that the brake band and clutch on said hoist were worn out, loose, inadequate and unsafe and that said clutch and the band thereof could not be adjusted by said lever under the control of the hoistman so as to retard and control the speed of said hoist and prevent the same from attaining a dangerous rate of speed, and that the hoistman, Joe Egbert, was incompetent, inexperienced, nervous and excitable, and that the State law was violated in that the shaft into which the deceased was being lowered at the time of his said accident was more than two hundred and fifty feet in depth and was not equipped with a mine cage, skip, or bucket fitted with safety clutches, and that the cage was being lowered at a greater speed than six hundred feet per minute in violation of the State law, and that a copy of said State law was not posted on the gallows frame, or in



any other conspicuous place at or in said mine, and that the defendant had failed to promulgate reasonable and adequate hoisting rules and regulations; that there is no evidence that the defendant failed to furnish the deceased with a reasonably safe place for the performance of the duties required of him or that it failed to furnish the deceased with proper, safe, suitable, and adequate machinery, tools and appliances for the performance of the work required of him, or that the bolts, lugs, or keys by which the clutch was fastened to the shaft of the drum of said hoist were loose, worn out, unsafe, or inadequate, or that the brake band or clutch on said hoist were worn out, loose, inadequate, or unsafe, or that said clutch and the band thereof could not be adjusted by said lever under the control of the hoistman so as to retard and control the speed of said hoist and prevent the same from attaining a dangerous rate of speed, or that the hoistman, Joe Egbert, was incompetent, inexperienced, nervous, or excitable, or that said shaft was not equipped with a mine cage, skip, or bucket, fitted with safety clutches, or that the cage was being lowered at a greater speed than six hundred feet per minute, or that a copy of the State Mining Laws was not posted upon the gallows frame, or in some conspicuous place at or in said mine, or that the defendant had failed to promulgate reasonable and adequate hoisting rules and regulations; but on the contrary the evidence does affirmatively show that the defendant had furnished the deceased with a reasonably safe place to work and had furn-



ished deceased with proper, safe, suitable and adequate machinery, tools and appliances for the performance of the work required of him, and that the bolts, lugs, and keys by which the clutch was fastened to the shaft of the drum of said hoist were safe and adequate and that the brake band and clutch on said hoist were safe and adequate and that the control of the speed of said hoist could be regulated by the lever under the control of said hoistman, and that the hoistman, Joe Egbert, was competent and experienced, and that said shaft was provided with a bucket fitted with safety clutches, and that said bucket was not lowered at a rate of speed in excess of six hundred feet per minute, and that defendant had promulgated proper and reasonable hoisting rules and regulations.

The defendant further contends that it is undisputed that the proximate cause of the accident to the deceased was the loosening, and the failure to tighten, the nut upon the clutch bolt upon said shaft; that if the loosening thereof and the failure to tighten the said nut was the act or omission that would constitute negligence, that it was not the negligence of the defendant, but was the negligence of a fellow servant, or fellow servants, of the deceased, for whose negligence the defendant is not liable.

The defendant further contends that the proximate cause of the accident to the deceased, as hereinbefore particularly mentioned, was not the act or omission, or a failure on the part of the defendant to discharge its duty toward the deceased, which

was pleaded, or mentioned, or relied upon by the complaint of the plaintiffs in this action.

The defendant further contends that the verdict in this cause is excessive and that it is the verdict of passion and prejudice, rather than of a consideration of the evidence in the case; that it was disclosed by the evidence that the deceased was thirty-seven years of age at the time of his said accident; that under the evidence in this case the plaintiffs by the death of the deceased could not have been injured in dollars and cents over the sum of Five Thousand (\$5000.00) Dollars, and that if the plaintiffs were under any view of the evidence entitled to a verdict such verdict should not have been in a sum exceeding Five Thousand (\$5000.00) Dollars.

This petition is made upon the pleadings and papers on file and upon the minutes of the Court and the evidence of all of the witnesses, and of all of the proceedings in this case, and upon any bill or bills of exceptions which may hereafter and before the hearing of this petition be filed herein.

JAMES A. WAYNE,

Attorney for Defendant.

Service of the within and foregoing Petition for a New Trial is hereby admitted and receipt of a true copy thereof acknowledged this 21st day of December, A. D. 1916.

PLUMMER & LAVIN,

THERRETT TOWLES,

Attorneys for Plaintiffs.

Endorsed: Filed Dec. 26, 1916.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

OPINION ON PETITION FOR NEW TRIAL  
DIETRICH, *District Judge*:

I have examined with painstaking care the elaborate and able brief presented upon behalf of the defendant in support of its petition for a new trial. It is unnecessary to notice a number of the points discussed, for at the trial they were ruled, and they still must be ruled, in its favor. Without discussion, it must be conceded that, as stated in the defendant's brief, "if the plaintiff is permitted to finally recover in this case it must be upon the theory that the defendant failed in the discharge of its duty to furnish the deceased with reasonably safe instrumentalities, and failed to keep said instrumentalities in reasonable safe condition and repair, and failed to properly inspect the same." While in their complaint the plaintiffs set forth numerous particulars in which the defendant was negligent, the cause was finally submitted to the jury upon a very narrow theory. The instructions may be justly subject to the criticism that they were longer than necessary, but in effect the jury was told that the plaintiff could recover only in case it was found that the defendant is chargeable with the negligent failure upon the part of one of its employes to readjust a screw upon the hoist clutch which had been loosened for the purpose of rewinding the cable. It cannot be questioned that the failure to tighten the screw before using the hoist constituted negligence on the part of someone, and the controlling, if not substantially the only

question, therefore, was, whether in fact and in law the defendant was responsible therefor. This question of fact was submitted to the jury, under instructions which were summarized in the statement made to the jury after my attention was directed to certain particulars in which counsel for the defendant deemed the original instructions to be either ambiguous or erroneous, as follows: "If you find from the evidence that the witness Lytton, who was the hoist man upon the shift immediately preceding Egbert, and Egbert were under the direction and exclusive command and authority of the master mechanic or general foreman, or both, and that the deceased, and other pushers, as they are called, that is, occupying the same position that he did, with other shifts or crews, and you further find that Witkowski, the deceased, and other pushers, had no authority over or right to give orders to or direct said hoist men as to matters and things incident to or pertaining to keeping said hoist in a reasonably safe condition of repair and efficiency, and that said Lytton, when he went off shift, left the same in an unsafe condition of repair and efficiency, without notifying the succeeding engineer, Egbert, of such condition, and that such conduct on his part was negligence contributing to or causing the injury, and his act in so leaving the screw and failing to notify Egbert constituted the proximate cause or contributed to the death of the deceased, then you should find for the plaintiffs, unless you further find that Witkowski knew or had reason to believe in the exist-



ence of the mechanical conditions which did exist, and which constituted the defective condition of the hoist, and was further able to appreciate the risk incident to such condition, and notwithstanding such knowledge or information, and such ability to appreciate the risk, attempted to ride down upon the bucket, when the hoist was in such defective condition." It will be noted that it was expressly explained to the jury that even though it should be found that the defendant was chargeable with negligence relative to the loose screw, still, if Witkouski had knowledge thereof and was able to appreciate the risk incident to such condition, and, notwithstanding such knowledge or information, attempted to use the hoist, the plaintiffs could not recover. One of the grounds upon which the defendant now seeks a new trial is that the deceased was chargeable with such knowledge. It appears that his shift went on duty before the preceding shift had entirely completed the rewinding of the cable, and, at his suggestion, he and his crew completed the job, and if he knew or had reason to believe that the screw holding the clutch had been loosened for the purpose of rewinding the cable and had not been tightened again, the plaintiffs could not recover. But upon a re-examination of the record I am still satisfied that this was a question for the jury. There is no positive or direct evidence that the deceased knew that the screw had been loosened. One witness, Moran, testified that he and his crew had themselves on other occasions unwound and re-coiled the cable, but that fact does not necessarily imply such knowledge.



Lytton testified only that the cable had been re-wound once on Witkouski's shift. Whether or not he participated in the process is left to inference. It is further stated in the brief that the deceased knew that it was customary to loosen the clutch bands by unscrewing the nut for the purpose of re-winding the cable, but there is no substantial evidence to support such a statement. The testimony of Lytton is again relied upon. He was asked: "Q. And was it always customary to loosen that clutch to do that? A. Yes, sir, it was. Q. Did Witkouski know of that fact? A. I suppose so. I couldn't tell you whether he did or not." Such an answer does not constitute competent evidence. It is further contended that Lytton, whose shift immediately preceded that of Witkouski, and under whose direction the screw was loosened, told the deceased, when the shifts were changed, that he had loosened the clutch, but there is no substantial evidence to support such claim. When upon the witness stand Lytton expressly stated that he did not so tell the deceased, and when asked the question which counsel for the defendant asked him for the purpose of laying the foundation for impeachment, whether he had not so stated to Sherman Gregory at a certain time and place, he testified that he did not recollect having made such a statement. To be sure, Gregory testified that he did make the statement, but even so the very most that could be claimed for Gregory's testimony is that it neutralizes Lytton's positive testimony to the effect that he had not told Witkouski

of the loosening of the clutch, and therefore at most the record is without any evidence one way or the other upon the point. Upon cross examination of the witness Moran, counsel for the defendant sought to show direct knowledge on the part of Witkouski of the loosened clutch, but again the evidence falls short. The witness testified: "Q. And you in connection with Witkouski and the other men on your shift had on other occasions re-coiled the cable on the drum, had you not? A. We had. Q. And it it was customary and proper, when you were re-coiling the cable, to first loosen the clutch, so as to pull the cable off without pulling against the clutch, isn't that correct? A. That I don't know. Q. You don't know whether they would or not? A. No. Q. When you went on shift did you hear either Jacobson or Lytton tell Witkouski that they had loosened the clutch? A. No." The testimony as a whole barely presents sufficient evidence from which the jury might draw the inference that Witkouski, coming on duty before the process of re-winding the cable had been finished, knew or had reason to believe that the clutch had been loosened. But it is only a possible,—surely not a necessary,—inference. The screw was loosened by the hoist man and not by the "pusher" (Witkouski), or the men more directly under his control. It is not clear that there is any general custom, for if the testimony of some of the witnesses is to be believed ordinarily it is unnecessary to loosen such a screw, it being required in this case only because the shaft of the drum was defective. But in-

sofar as there is a common practice, it is abundantly shown that the duty of loosening and tightening the screw rests upon the hoist man. Hughes, the defendant's master mechanic expressly so testified and he further stated that the screw should be tightened again before the cable is re-wound. It might very well be, therefore, that the deceased was without knowledge of what the hoist man did to release the drum or at what stage of the process of rewinding the cable, readjustment of the clutch or the clutch screw was made. Plainly if Witkowski was familiar with the mode of procedure testified to by Hughes he had a right to assume, and naturally would assume, when he went on duty and found that the cable had been partly re-wound, that the clutch screw had again been tightened. The burden was upon the defendant to establish its charge of contributory negligence, and, to say the least, the evidence is insufficient to warrant a preemptory instruction for the defendant, and the instructions given were therefore as favorable to it as the evidence warranted.

It is further contended that the accident was due to the careless operation of the hoist by Egbert, the hoist man who went on duty at the same time with the deceased. It may be admitted that while Egbert was engaged in operating the hoist he was a fellow servant with the deceased, and if his negligence was the proximate cause of the accident the plaintiffs could not recover. But the defendant did not try the case upon this theory. It pleaded certain affirmative defenses, but nowhere did it allege that



the accident was the result of the negligence of Egbert, and that he being a fellow servant with the deceased the plaintiffs could not recover. No instruction was requested defining such theory for the jury, and the instructions given were not excepted to in that respect. If my memory is not at fault, in the argument to the jury the defendant conceded that the accident was due to the fact that the clutch did not properly function. I stated to the jury that such was the defendant's concession, and repeated the statement, but no objection was made or exception taken, and surely if the defendant had been then contending, as it now contends that Egbert's carelessness in operating the hoist was the proximate cause of the accident, objection would have been made and exception taken to an instrument so obviously erroneous and prejudicial. Possibly if we were to disregard the failure of the defendant to plead such defense, the question of Egbert's negligence was sufficiently presented by the evidence to warrant a submission thereof to the jury, and it probably would have been submitted as a matter of course had the concession already referred to not been made and had request for a proper instruction been presented. It may be that a jury could find that he did not exercise a reasonable degree of vigilance and care. But at most it is a mere question for the jury; no one could say that it conclusively appears that he was negligent, and that such negligence was the proximate cause of the accident, and that therefore the verdict is against the law or that the evidence is insufficient to support the verdict.

The most favorable view to the defendant that can be taken is that, with a proper pleading and upon seasonable request, an instruction should have been given submitting the question to the jury as to whether or not he exercised proper care in handling the hoist, and, if not, whether his negligence was the proximate cause of the accident. But granting that it is sometime within the sound discretion of the court to grant a second trial, for the purpose of enabling a party to try a case upon a new theory, I do not think I would be warranted in exercising such extreme discretion in favor of the defendant in this case, for the reason that there is not, in my judgment, good ground to expect that if the answer were amended so as to plead such a defense, and if upon the present record, the question were clearly and distinctly submitted to a jury, under proper instructions, the finding would be in favor of the defendant. The granting of a new trial, therefore, upon such a ground, would be an improvident exercise of judicial discretion.

It is further urged that error was committed in adopting the theory, and in instructing the jury, that in re-winding the cable and in the operations necessarily incident thereto the defendant's servants, while so engaged, whatever may have been the nature of their general employment, were acting for the defendant in the performance of its non-delegable duty to furnish to its employes reasonably safe instrumentalities with which to carry on their work. This point was fully considered during the course of the



trial and I have no disposition to recede from the conclusion then reached. The deceased and the men under his direction were engaged in sinking a shaft. The hoist was a mere instrumentality furnished to them, by means of which they were to carry on the work. At the time of the accident they were being conveyed by it to the place where they were doing their work. Under the direction of the master, the preceding crew had undertaken to re-wind the cable, for the purpose of taking the kinks out of it, and thus prolonging its life. Before the deceased could use this indispensable instrumentality he and his crew completed the re-winding of the cable; the service thus performed was entirely aside from the line of their general duty. While they and the preceding crew were so employed they were all acting for, and in the place of, the defendant. And as to the particular service which was negligently performed in this case it is too clear to admit of discussion that the hoist man was a vice-principal. The master mechanic testified that when it became necessary to take kinks out of the cable it was the hoist man's duty to loosen and tighten the clutch screw. His legal status while so acting was precisely the same as if he had been sent directly from the mechanical department; he was not operating, but mending, the device. It was his duty to loosen the screw, unwind the cable, again tighten the screw, and then re-wind the cable. In this case the defendant, acting in the person of Lytton, the hoist man, loosened the screw, and then negligently failed to tighten it again before

starting to re-wind the cable. Witkowski, coming on duty before the cable was fully re-wound, completed the process, and, being ignorant (so the jury found) of the failure of the defendant to readjust the clutch, got upon the bucket and gave his hoist man the customary signal. The bucket descended with increasing speed until, becoming alarmed, and fearing that the hoist was beyond control, he jumped to save himself, but, missing the cross timbers, fell to his death. In so doing, the jury found, he did not act unreasonably. It must not be understood that I hold that employes are necessarily not fellow servants when they are in different departments. The contrary may be the case. But here the mechanical department performed the non-delegable duties of the defendant, and therefore the phrase is used for convenience. Whether there was or was not such a department, when Lytton was directed to and did engage in the repair of an instrumentality, he became a vice-principal. Defendant cites with apparent confidence *Quebec Steamship Co. v. Merchant*, 133 U. S. 375. But the apparent relevancy of the case lies in the fact only that the servant who was negligent was called a "carpenter." But the duty he negligently performed was not that of a carpenter at all, but of an attendant or porter. He was an operative only, and was not repairing or inspecting the ship. In no sense was he a vice-principal. It is not what an employe is called, but the nature of his service, that fixes his status.

Finally it is suggested that if in rewinding the cable Lytton was acting in the mechanical department, so also was the deceased and the other members of his crew, and therefore they were all fellow servants. But even if it could be held that under the circumstances of this case the deceased and Lytton should be deemed to be fellow servants during the time the cable was being readjusted,—a point I do not decide,—it is sufficient to observe that when he was killed Witkouski was no longer in the mechanical department; he was not repairing an instrumentality, but was using it for the purpose for which it was designed. He had become an operative, and was engaged in the performance of his general duties as such. It would be as reasonable to say that a locomotive engineer could not recover for an injury received in a wreck of his train due to a faulty repair of his engine, because, before starting, he had given the mechanics some slight assistance in making the repair. Of course, if the engineer himself had, through his own carelessness, been responsible for the defective repairs, or if he had knowledge thereof, other considerations would be involved, but we are not considering only the effect upon the plaintiffs' rights of the fellow-servant rule which the defendant invokes.

The petition for new trial must therefore be denied and such will be the order.

Filed April 9, 1917,

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 657.

ORDER DENYING MOTION FOR NEW TRIAL

This cause coming on to be heard before the court on Defendant's Motion for New Trial, and to set aside the verdict of the jury in said cause, and after hearing said Motion, and a consideration of the same by the court,

*It Is Ordered, Adjudged and Decreed*, that defendant's Motion to set aside the verdict of the jury, and to grant a new trial in said cause, be and the same is hereby denied.

Done in open court this 12th day of April, 1917,  
A. D.

FRANK S. DIETRICH,

Judge.

Endorsed: Filed Apr. 13, 1917,  
W. D. McReynolds, Clerk.

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(Title of Court and Cause.)

No. 657.

PRAECIPE

*To the Honorable W. D. McReynolds, Clerk of the  
Above Entitled Court:*

Will you kindly prepare and have printed, according to the laws of the Circuit Court of Appeals for the Ninth Circuit, a Supplemental Transcript in the above entitled cause, containing defendant's petition or Motion for New Trial, and the Opinion of the Court filed therein, and also the order of the court



denying said motion, and certify the same as a Supplemental Transcript, showing the cost of preparing and having printed said supplemental record, also to contain this Praeipe, and when so printed and certified, kindly transmit the same to the Clerk of the Circuit Court of Appeals, Ninth Circuit, at San Francisco, California, according to the rules of said court, as to the number of copies, etc.

Kindly advise me the amount of the expenses and we will remit at once.

Dated at Spokane, Washington, this 23d day of June, A. D. 1917.

PLUMMER & LAVIN,  
Spokane, Washington.  
THERRETT TOWLES,  
Wallace, Idaho.  
*Attorneys for Plaintiffs.*

Filed June 27, 1917,

W. D. McReynolds, Clerk.

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(Title of Court and Cause.)

No. 657.

CLERK'S CERTIFICATE

I, W. D. McReynolds, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing supplemental transcript of pages numbered from 1 to 29, inclusive, to be full, true and correct copies of Petition for a new trial, Opinion on petition for a new trial, Order denying motion for new trial, Praeipe for supplemental



transcript, and Clerk's certificate, and that the same is supplemental to the original transcript and prepared in accordance with praecipe of the Defendant in Error, filed herein.

I further certify that the cost of the record herein amounts to the sum of \$39.50, and that the same has been paid by the Defendant in Error.

Witness my hand and the seal of said court this 2nd day of July, 1917.

W. D. McREYNOLDS,  
*Clerk.*

(SEAL.)



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**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit**

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CONSOLIDATED INTERSTATE- CALLAHAN MINING COMPANY, a Corporation,  Plaintiff in Error, vs. BERTHA D. WITKOUSKI, et al, Defendants in Error.	}	AT LAW
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**Brief of Plaintiff in Error**

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UPON WRIT OF ERROR FROM THE UNITED STATES  
 DISTRICT COURT FOR THE DIS-  
 TRICT OF IDAHO

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JAMES A. WAYNE,  
 Wallace, Idaho,  
 Attorney for Plaintiff in Error.

THERRETT TOWLES,  
 Wallace, Idaho,

PLUMMER & LAVIN,  
 Spokane, Washington,  
 Attorneys for Defendant in Error.

Filed



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**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit**

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CONSOLIDATED INTERSTATE-  
CALLAHAN MINING COMPANY,  
a Corporation,

Plaintiff in Error,  
vs.

BERTHA D. WITKOUSKI, et al,  
Defendants in Error.

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} AT LAW

This action was prosecuted by the widow and minor children of Charles F. Witkouski, to recover damages for the death of said Charles F. Witkouski, alleged to have been caused by the negligence of the plaintiff in error. The cause was tried to a jury and resulted in a verdict of Fifteen Thousand (\$15,000) Dollars in favor of the defendants in error. This writ of error has been prosecuted from said judgment. In this brief the parties will be referred to by their designation in the trial court.

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*STATEMENT OF THE CASE.*

The deceased, Charles Witkouski, was employed at the defendant's mine in the capacity of a "pusher,"



that being a term used to designate the boss of a crew of men engaged in sinking a shaft not yet completed. On May 18th, 1916, the deceased with the other men on his crew were descending on the rim of the bucket, used in such shaft to raise or lower objects, and, apparently, thinking that the hoistman had lost control of the bucket the deceased jumped therefrom in an effort to catch hold of the dividers, being the wooden beams used to separate the different compartments in the shaft, of which there were three in this particular shaft. The deceased was unable to catch a firm hold of the divider, and consequently fell to the bottom of the shaft and was instantly killed.

In order to clearly present the questions which we desire to raise upon this writ of error, we think it not only proper, but necessary to go with considerable detail into the issues in this case as framed by the pleadings, and the evidence offered in support of these pleadings.

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### *Charges of Negligence Made in the Complaint.*

The specific charges of negligence contained in plaintiff's complaint were eight in number, to-wit:

1. That the defendant was negligent in employing and keeping in its service the hoistman operating the hoist at the time of the accident, to-wit, Joe Egbert, for the reasons that said Egbert was incompetent, inexperienced, nervous, and excitable, and that defendant knew that said hoistman was not a fit and proper

person to be intrusted with the operation and care of said hoist. (Paragraph XI. Transcript page 13).

2. That defendant had failed to furnish the deceased a reasonably safe place for the performance of the duties required of him. (Paragraph XII. Tr. p. 13).

3. That the defendant was negligent in failing to furnish to the deceased proper, safe, suitable and adequate machinery, tools and appliances for the performance of the work required of him, in that the bolts, lugs, and keys by which the clutch was fastened to the shaft of the drum of the hoist were loose, worn out, unsafe and inadequate; that the brake band and clutch thereon were worn out, loose, inadequate and unsafe, and that said clutch and the band thereof could not be adjusted by said lever under the control of the hoistman so as to retard and control the speed of said hoist, and prevent the same from attaining a dangerous rate of speed, and from falling to the bottom of said shaft. (Paragraph XII. Tr. p. 13).

4. That a State law of Idaho providing in substance that it is unlawful for any person to sink or operate a vertical shaft to a greater depth than 250 feet without having the same equipped with a mine cage, skip or bucket fitted with safety clutches had been violated by the defendant. (Paragraph XIII. Tr. p. 14).

5. That a State law making it unlawful for any person, company, or corporation to hoist or lower men

at a greater speed than 600 feet per minute had been violated. (Paragraph XIII. Tr. p. 14).

6. That a State law requiring every mining property using hoisting apparatus to keep one copy of the mining code posted on the gallows frame, and a copy of the bell signals before the hoist engineer and on each station, had been violated. (Paragraph XIII. Tr. p. 14).

7. That the defendant was negligent in not promulgating proper and necessary hoisting rules and regulations, and particularly a rule requiring the hoist to be raised and lowered before permitting men to be transported therein. (Paragraph XVI. Tr. p. 14).

8. That the defendant was further negligent in not having its master mechanic make proper and reasonable inspections of the hoisting machinery and apparatus. (Paragraph XVIII. Tr. p. 15).

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*Certain Charges of Negligence Withdrawn.*

At the close of plaintiff's evidence, and during the time when defendant's counsel was making its motion for a non-suit plaintiff's counsel admitted that they had failed to even attempt to prove the charges of negligence embraced in Numbers 1, 4, 6 and 7 above mentioned. (Tr. p. 165-166).

Upon the proposition that defendant had failed to furnish the deceased with a safe place to carry on his work, (number 2, aforesaid) and that the master

mechanic had failed to properly inspect this hoist, (number 8, aforesaid), there is an entire absence of any testimony supporting these charges whatsoever, and no such questions were ever submitted to the jury under the Court's instructions, so that we may assume that these charges of negligence are also out of the case.

The only charges of negligence upon which the plaintiffs' case was based at the close of the testimony, then, have relation to the condition of the hoisting apparatus, and the particularly alleged defects enumerated in number 3 aforesaid, and in paragraph XII of the complaint, (Tr. p. 13), and the rapid descent of the bucket at the time of the accident (number 5, aforesaid, and paragraph XIII of the Complaint, Tr. p. 14). And the speed of the bucket was so dependent upon the condition of the hoisting apparatus at the time of the accident as to leave the single question of negligence in the case, i. e., whether or not the defendant had discharged its duty of furnishing to its employes, and particularly to the deceased, reasonably safe instrumentalities with which to do the particular work in which he was engaged at the time of his death.

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### *Evidence in the Case.*

On the 18th day of May, 1916, the deceased, Charles Witkouski, was engaged with other men in sinking a new shaft in the Interstate-Callahan Mine (Testimony of Al Rengquist, p. 116); this shaft had not yet been completed and was not equipped for use as an operat-

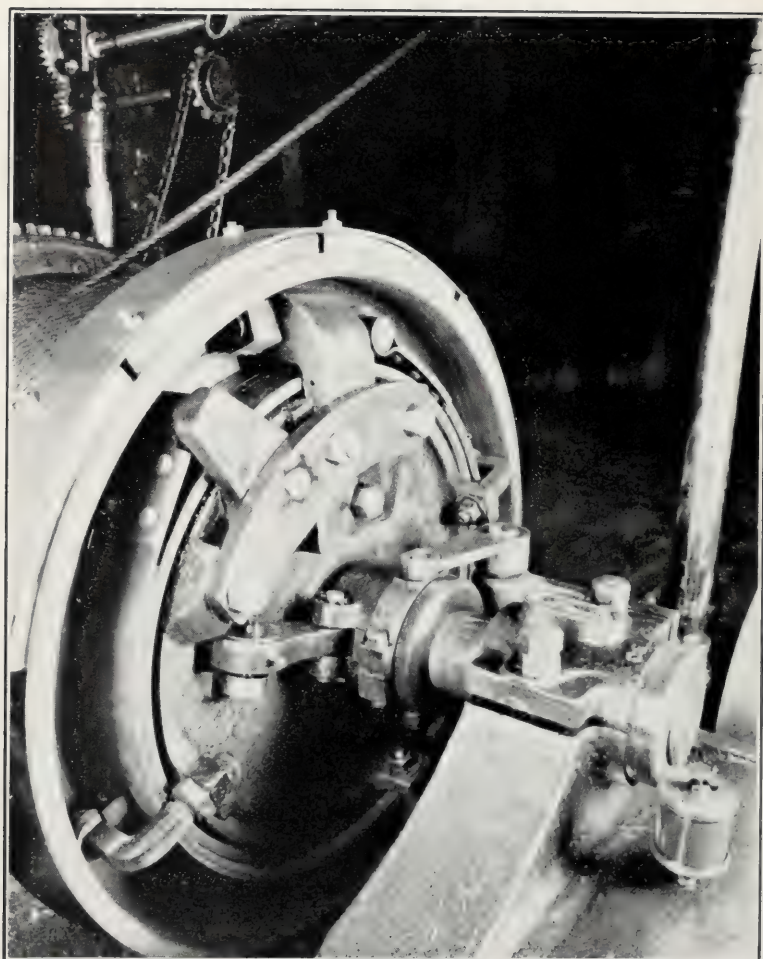


ing shaft (pp. 15, 116); there were three crews of five men each engaged in the work of sinking this shaft (p. 115); each of these crews consisted of a hoistman, three laborers, and a boss who was known as a "pusher" (p. 116); Witkouski was the boss of his gang (Testimony of Moran p. 51) and of the hoistman in that gang (Testimony of Edward P. Moran, pp. 41, 51, 52, 71, 72); (Herbert Erickson, pp. 77, 78, 79, 82, 83); (Joe Egbert, pp. 95, 96); (Al Rengquist, p. 115); (J. H. Lytton, p. 129); and defendant's witnesses Sherman Gregory, p. 191; Norman McDonald, p. 199; and Charles Meade, p. 208.

The hoisting equipment, consisted of a Lake Shore Double Cylinder Geared Hoist, having a drum upon which the cable was coiled, and a clutch band which by compression on the shaft of this drum transmitted the engine power to the drum when in use (p. 220); the hoist was driven by compressed air; the cable was attached to a bucket which was lowered and raised in the shaft for the purpose of raising or lowering any materials which were used in the work being prosecuted, and for the purpose of raising waste from the shaft, and as the means of lowering and raising the men whose work required them to be at that place; this bucket was of the same type as usually used in shafts which are in process of being sunk, and it is always the custom to use a bucket rather than a cage, or skip in incomplected shafts. (Testimony of Moran, p. 50); the hoist itself was admittedly of a kind and character sufficient and proper for the uses to which it was be-







ing put. (Admissions of plaintiffs' counsel, pp. 228, 229, 230).

In the photograph which is appended hereto is shown the hoist in question, showing the cable coiled upon the drum and the clutch on the end of the drum. It will be noticed that the clutch band fastens upon lugs at the upper part thereof, the left hand lug being stationary, but the right hand one being movable by means of a clutch bolt which is shown almost directly at the top of the drawing. By loosening the nut on this clutch bolt the clutch band would be loosened and released to such an extent as would permit the easy descent of the hoist without the use of power or brake.

Witkouski and his crew were working not only for wages, but received in addition thereto a bonus dependent upon the amount of work which they did. (pp. 50, 80). For this, or some other reason, the work of sinking this shaft was being rushed to completion by Witkouski and his crew. (Testimony of Herbert Erickson, p. 79); (See also testimony of witness Sherman Gregory, p. 185).

Witkouski, the deceased, was familiar with this hoist and had himself upon occasions operated the same. (Testimony of Moran, p. 52); (Also testimony of Joe Egbert, p. 193).

The shaft crew which had preceded Witkouski's, and which consisted of a like crew of five men, had been engaged during at least a portion of the day in unwinding and recoiling the cable on the drum of the

hoist (pp. 41-42, 53). The purpose of unwinding and recoiling the cable was to take the kinks out of the same, it being a new cable. (Testimony of Moran, p. 42). In order to unwind or uncoil the cable it was customary and proper and usual to loosen the clutch band on the hoist, so that the men in pulling the cable off the drum would not be compelled to pull against the engine, or in other words to turn over the engine as the cable was uncoiled. (Moran p. 52; Joe Egbert pp. 100-101). This clutch band was released by the loosening of one nut located upon the clutch bolt, (pp. 101-102). When this one nut was loosened, the clutch band ceased to engage the shaft with any considerable degree of firmness, and the cable might then quite readily be pulled off or uncoiled from the drum. The hoistman on the preceding shift, one Lytton, had loosened this nut when the work of unwinding and recoiling the cable had commenced, it being necessary to do so (Testimony of J. H. Lytton, p. 121). It was also customary to loosen this clutch bolt when unwinding the cable (pp. 127, 128).

The deceased and his crew had themselves on other occasions unwound and recoiled this cable (Testimony of J. H. Lytton, p. 127) and Witkouski knew that in doing so it was customary to loosen the clutch bands by unscrewing the nut upon the clutch bolt, (p. 127). After the accident to Witkouski, Lytton, who had loosened this clutch bolt, in a conversation with Sherman Gregory, told the latter that when Witkouski came on shift just preceding the accident, he, Lytton, had advised Witkouski that he had loose-

the nut on the clutch bolt, and hence released the clutch band, and that Witkouski knew that the hoist was in that condition. (Testimony of Sherman Gregory, pp. 180, 189, 190). Although the hoistman Lytton was interrogated expressly as to this conversation with Gregory he does not anywhere deny the same. (pp. 130-131); he merely says he does not remember making the statement, although expressly admitting that shortly after the accident he had some conversation with Gregory, the purport of which he does not attempt to give. And as this is the only evidence upon this point, we have the positive affirmative evidence of Gregory on the one hand, and the lack of recollection of Lytton on the other hand, coupled with his refusal to expressly deny such conversation. And we may fairly assume that when Witkouski went on shift, Lytton told him of the condition of the hoist with particular reference to the loosening of the nut on the clutch bolt. But, be that as it may, it was proven by indisputable evidence, introduced by the plaintiffs themselves, that Witkouski knew that it was usual and customary to loosen this nut before unwinding the cable to take out the kinks. (pp. 52, 127, 128); he and his crew had on other occasions recoiled this very cable (Testimony of Moran, p. 52; Lytton, p. 127, and Joe Egbert, p. 195); and on the particular night of the accident when Witkouski and his crew went on shift the work of rewinding the cable had not yet been completed (Testimony of Moran, p. 53); so Witkouski himself told the other crew to quit and that he and his crew would complete the work of rewinding the cable



(p. 53): and they did complete the work of rewinding the same (p. 53). Nothing was noticed with reference to the clutch bands slipping (pp. 44-45) so Witkouski and his men loaded the bucket with lagging, and all climbed upon the rim thereof preparatory to descending into the shaft.

It was admitted by plaintiffs' counsel that the hoist was sufficient for the work in which it was being used (p. 230). There was some evidence to the effect that the drum shaft was slightly sprung (Testimony of Lytton, pp. 122-123), so that at one place the clutch band engaged the shaft more firmly than elsewhere, and that this was the reason the clutch bolt was loosened while the cable was being unwound. The hoistman on Witkouski's shift contradicted this, however, (Testimony Joe Egbert, p. 194) as does also Norman McDonald (p. 198), Charles Meade, (p. 205) and Hughes, (p. 232). The evidence is uncontradicted, however, that even if the shaft on the drum was slightly sprung, that the clutch bands did properly engage the shaft when this one nut on the clutch bolt was tightened. (Lytton, pp. 129-130). So clear and convincing was the testimony upon this point that the Court in his instructions advised the jury, that it was of little or no importance whether or not the shaft was sprung, as the clear weight of the testimony was to the effect that that fact, if a fact, had nothing to do with the accident, but *that the proximate cause of the accident was the loosening of the nut on the clutch bolt and the failure to tighten the same.* (Instructions of the Court, pp. 257-258); (See also testimony Joe Egbert, pp. 106-107;

J. H. Lytton, pp. 129-130). We quote from the instructions of the Court upon this subject:

“And I have to say to you that the evidence very strongly tends to show that the condition of this screw or bolt or nut is the proximate cause of the injury, or the accident, rather, and is the only immediate cause of the accident. There is some evidence tending to show that the shaft of the drum was sprung. However, the plaintiffs do not allege, and, as I understand, do not claim now, that this sprung condition of the shaft, even if you credit that testimony, directly contributed to the accident. That was brought in only for the purpose of attempting to explain why it was necessary to loosen this screw or bolt or nut. The defendant contends that it was not sprung, and that that is not the reason for loosening the bolt or nut, and the plaintiff contends that it was. But it is not alleged, and it is not now claimed, that the condition of the shaft of the drum in any wise affected the operation of the hoist upon the evening in question at the time the accident occurred. In other words, the clutch would not have held any better had the shaft been in perfect condition, if it was not in perfect condition. The fact, if it be a fact, that the shaft was sprung, did not in any wise affect the hoist man’s control of the hoisting machinery at the time in question. There is some evidence also tending to show that certain keys were loose in and about the mechanism which controlled the clutch or had to do with the operation

of the drum, but I have to say to you that there is no substantial evidence tending to show that the condition of these keys in any wise affected the hoist man's control of the hoist at that time."

The entire hoist, including the clutch and the brake, was in perfect condition. (pp. 105-106-108-194-197-198-199-205-206-207). The bucket was provided with the statutory safety cross-heads (pp. 57-58), and the company had promulgated the customary hoisting rules and regulations, limiting the speed of buckets carrying men not to exceed six miles per hour. (p. 69), and in compliance with the state law had by rule required a bucket that had been out of use for any length of time. to make at least one round trip before carrying men thereon (p. 69).

After Witkouski and three members of his crew had climbed on the bucket and told the hoistman to lower them, and after they had been lowered a distance of perhaps thirty feet, the bucket suddenly begun to descend very rapidly; as if anticipating the accident, and as if for the first time remembering the warning of Lytton that the clutch bolt had been loosened, Witkouski became suddenly frightened, saying that they were going down unusually fast (Testimony of Moran, p. 45) and that something must be wrong (p. 45); he then leaped from the bucket in an effort to catch the divider between the two compartments of the shaft, lost his grip on the divider, and fell to the bottom of the shaft and was killed. The other three men stayed in the bucket, and as soon as the hoistman Egbert

noticed the rapid descent of the same and realized that some one had loosened the clutch bolt and failed to tighten the same, he applied the brake gradually so as not to jar or jolt the men from the bucket, and stopped its descent about 150 feet from the bottom of the shaft. (Testimony Joe Egbert, p. 103); the bucket was stopped gradually and perfect control was had over the hoist by the application of the brake alone. (p. 104); the men who stayed in the bucket were uninjured.

It was shown that on other occasions it was usual for the bucket to be lowered not over 600 feet per minute (p. 80), and we conceive that it is unimportant in this case how rapidly the bucket did descend, except insofar as this might affect the question of whether or not Witkouski was justified in jumping from the same. Moran estimated that the bucket descended at a speed of from 20 to 25 feet per second, but admits that this was merely a guess on his part (pp. 46-63). Undoubtedly the bucket did descend very rapidly between the time when its speed was first accelerated and the time when the hoistman, noticing this rapid descent, applied the brake. During this time the bucket fell approximately 150 feet. (p. 66).

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#### *Proximate Cause of the Accident.*

In the foregoing we have endeavored to faithfully state the facts proven upon the trial, and mindful of the rule that upon an appeal the evidence will be considered in the light most favorable to the party in whose



favor the jury has rendered its verdict, we have in such statement referred chiefly to the testimony of witnesses called by the plaintiffs.

From the foregoing statement of facts it must be conceded that the defendant had discharged its full duty toward the deceased insofar as that duty required it to furnish him with a reasonably safe place to work, and with reasonably safe machinery, appliances, tools and instrumentalities with which to work; that it had not been negligent in employing incompetent, or inexperienced servants to work with the deceased; that it had promulgated all proper and necessary rules, at least so far as the particular work in which the deceased was engaged at the time of his accident is concerned, and that the machinery and instrumentalities in use were inspected at proper times. It must be conceded also that the hoisting apparatus was in perfect repair, and that the only condition which could be considered as rendering it in any degree inefficient at the time of the accident was the loosened clutch bolt; and that this condition had arisen by reason of one of the servants having purposely loosened the clutch bolt in order to render the work which they were then about to do, more easy of performance, and that this servant, and the servant who succeeded him, had failed to tighten this clutch bolt.

Manifestly, also, the mere loosening of this clutch bolt, and the failure to tighten the same, did not render the hoist inefficient, and could not have caused the accident to the deceased had the hoistman used



proper care in the operation of such hoist, for it is established by uncontroverted testimony that not only were the brakes sufficient to control the hoist, even when the clutch band was entirely loosened, (testimony of plaintiffs' witness, Lytton, pp. 125-126), but that the moment the hoistman himself saw the cable uncoiling too rapidly from the drum of the hoist, that he did by the application of these brakes alone slowly and gradually stop the hoist while it was still something over 150 feet from the bottom of the shaft (testimony of Egbert, pp. 102-103), and with slightly a jar to its occupants.

At the close of the evidence introduced by the plaintiffs, the defendant made its motion for a non-suit, which the Court denied. As we understand the action of the Court upon this motion it was based upon this theory. That in the operation of taking the kinks out of this cable, and in the doing of all of the acts embraced within that operation, a duty of the mechanical department was being performed, to-wit: the non-delegable duty of the defendant company to keep this hoisting machinery in proper repair; that the negligence which was the proximate cause of the accident to the deceased was the loosening of the nut on the clutch bolt, and the failure to tighten the same, and that this negligence was the negligence of the master in failing to properly repair the hoisting apparatus. Let us quote from His Honor's statement as found in the record, (pp. 171-172):

"Now I am inclined rather to take this view of

the application of the well known principles of law, that the occasion for doing what was done in this case, as a result of which the hoisting apparatus became inefficient for the purpose for which it was intended, was the slack in this new cable incident to its use, and that it became necessary to repair it or to readjust it, not because any sudden emergency arose, but, as one witness I think put it, to keep the cable from wearing out rope or cable from wearing out or becoming impaired. Now I am not inclined to take the view under the testimony that the duty of making these repairs or these alterations or adjustments, whatever they may be called, rested upon the crew of which Mr. Witkouski was the foreman. His duties were of an entirely different character. The hoist man was simply being used as an instrumentality. He was not in charge of the hoist, in the sense that he was responsible for keeping it in repair. It is true that the hoistman was subject to his direction for certain purposes, but only for certain purposes. If it be argued that some of the testimony tends to show that the hoist man was entirely under his control, subject to discharge by him, the weight of the testimony I think is clearly to the effect that he was not subject to be discharged by the pusher or foreman of this crew, that if his service in operating the hoist was unsatisfactory, he would be reported to the foreman or superintendent, and it would be for the foreman or superintendent to say whether he should be discharged or transferred or

retained in that particular service. It is quite possible that for various reasons the hoist man might not be satisfactory to the crew, and in the operation of the mine the foreman might believe that he was a competent and efficient man, and still, in order to preserve harmony, might transfer him to some other hoist or set him at some other work, or discharge him entirely. I think that the testimony pretty clearly shows that such were the relations between these parties, and under this rule it seems to have been the duty of the mechanical department to take care of these hoists and to see that they were put in proper repair. Now if the testimony isn't conclusive, at least there is sufficient to require that the question be submitted to the jury, as to whether or not the hoist man, as to this particular condition or defect, was delegated by the mechanical department to remedy it or make the necessary repairs. My impression is, from the testimony, that such was the undertaking, that when the slack occurred in this cable or rope, the instructions from the mechanical department went to the hoist man to see that it was rewound or re-adjusted to the drum, in order to avoid unnecessary wear and perhaps impairment. Now, to do that it became necessary, as is suggested, to loosen this screw. It wouldn't have been necessary to loosen that screw if the drum shaft had not been sprung and had not been in a defective condition, as I understand the testimony. In other words, the mechanism was such that upon releasing the

clutch lever the clutch would be disengaged entirely from the drum shaft, but because the shaft was sprung, as the drum revolved it would come into contact with the clutch at one point in the course of each revolution, and thus it would offer some resistance to the revolution of the drum. In that view, gentlemen, I think I shall have to adopt the conclusion that in readjusting the rope or cable for that purpose, in loosening this screw, and in leaving the clutch in that loosened condition, without advising the succeeding crew, the preceding crew was acting as the representative of the master, in the performance of a nondelegable duty or obligation, and that therefore the deceased would not be chargeable under the principle of the fellow servant rule."

Now, it is our theory of this case that the proximate cause of the accident to the deceased was not, as the trial court conceived it to be, the loosening of this clutch bolt, and the failure to tighten the same, but was rather the failure of the hoistman to properly operate the hoist; and that in either case, the negligence was that of a fellow servant.

For in the first place if it be conceived that the taking of the kinks out of this cable was the performance of the master's nondelegable duty to keep its hoisting mechanism in a proper state of repair, then it follows that every act involved in the operation of removing the kinks from this cable was a part of this same act of repairing the machinery, and all who engaged in



the performance of that act were, for the time being, servants of the mechanical department, and fellow servants one with the other; so that the man Lytton who loosened the clutch bolt, and the men who pulled the cable from the drum, and the man who with his hands removed the kinks from the cable, and the boss of the crew who superintended this operation, were all fellow servants, working for the time being in the mechanical department. And when the Jacobson crew were told by Witkouski (p. 53) to quit their work, and that he and his crew would finish the work of recoiling this cable, then Witkouski and his entire crew also become servants of the mechanical department, and fellow servants, one with the other. So if it be true that Lytton, who loosened the clutch bolt, and Egbert, who failed to tighten the same, were servants of the mechanical department for the time being, so also were Jacobson the "pusher" on the day shift, Witkouski, and all the men in their respective crews.

As a second proposition, it is established by the evidence of plaintiffs' own witnesses that there were three ways of absolutely controlling the descent of this hoist: one, by means of the air itself, secondly, by the proper application of the clutch, and third, by use of the brake. The brake, in particular, offered a proper and ready means for absolutely controlling the descent of the hoist at all times. Even if the clutch was entirely released, and the clutch bolt entirely loosened, the uncontradicted evidence of the witness Lytton, who at the time of this trial had been discharged by the defendant, and was a most friendly



and willing witness for the plaintiffs, establishes the fact that, had the hoistman been watching, he could by the application of the brake alone have stopped the bucket in an instant, or, as the witness puts it elsewhere, before it had dropped to exceed ten feet. On examination by plaintiffs' counsel, the witness Lytton testified:

"Q. In case this clutch was loose, would your engine have any retarding effect at all when you tried to lower the men down?

"A. No, sir, not if the clutch was loose.

"Q. How long would it take you before you could apply the emergency brakes if you found the engine wouldn't hold it?

"A. In an instant.

"Q. In the meantime it could have dropped some number of feet?

"A. Well, if a man is looking what he is doing he will never let it drop no distance.

"Q. Providing he can do it quick enough?

"A. Well, you can work—you have always got a firm pressure with your brake all the time.

"Q. If you didn't anticipate it you wouldn't be prepared, would you?

"A. The chances are that bucket may drop ten

feet with you before you would realize just what happened." (Lytton, pp. 125-126).

And this is further accentuated by the actual fact that at the time of the accident, as soon as Egbert noticed that the cable was reeling off the drum too rapidly, he could and did, by the use of the brake alone, stop the hoist gradually and properly, without jolt or jar, and without injury to the occupants of the bucket, (Testimony Egbert, pp. 102-103).

"Q. Now, the reason that the hoist descended rapidly was the fact that the clutch was loosened, was it not?

"A. That is what it was.

"Q. What gave you notice of the fact that it was going down too fast?

"A. I saw the cable uncoiling very fast.

"Q. And then you applied your brakes?

"A. Yes, sir.

"Q. And did you have any trouble in stopping the hoist by means of the brake?

"A. Well, I stopped it gradually, I was afraid to stop it quick.

"Q. And you had no trouble in stopping it gradually?

"A. I stopped it about 150 feet from the bottom."

Clearly then if Egbert had been looking at what he was doing and had had the firm pressure with his brake all the time as it was his duty to do, according to the statements of plaintiffs' witness, Lytton, the accident could never have occurred, for the hoist was so constructed that its descent could be controlled by the brake even when the clutch was entirely released, and even with the clutch bolt loosened the accident could not have occurred except for the heedless operation of the hoist by Egbert. And as soon as Egbert observed the rapid uncoiling of the cable, a fact which he should have ascertained immediately had he been attentive to his work, the descent of the hoist was easily controlled by the brake alone.

It is our thought, then, that the proximate cause of the accident to the deceased was not the failure of the defendant to furnish hoisting apparatus which was reasonably safe, nor to keep the same in reasonably good repair, but was rather the failure of the hoistman to operate said hoist with reasonable care and prudence, and to use that degree of watchfulness which a careful, prudent man should have used when lowering human beings.

In a case which we will later call to this Court's attention, the hoist furnished was an hydraulic hoist, and required the injection of water into the cylinders to prevent the too rapid descent of the same. The engineer failed to inject the water before proceeding to lower the men in the bucket, with the result that the bucket dropped, severely injuring one of its occupants.

The Court of Appeals held that the accident was not caused by the negligence of the Company in failing to furnish a safe instrumentality, but rather by the negligence of the hoistman in failing to properly operate an instrumentality which would otherwise have been safe. That case is indistinguishable from the present one. The hoist in this case was indisputably safe when the clutch bolt was tightened; it was also perfectly safe even if the clutch was entirely released, providing the hoistman was doing that which it was his duty to do, i. e., paying attention to his work.

And had the hoistman, Joe Egbert, been watching his work, he could have controlled the descent of the bucket by the brake, and the accident would not have happened.

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It will be urged herein that there was in the evidence in this case no proof of actionable negligence, and particularly that the plaintiffs failed to prove any of the specific charges of negligence set forth in their complaint; that if negligence was proven, it was the negligence of a fellow servant or fellow servants, for which the defendant was not liable; that the accident to the deceased was from a risk which he had assumed, and that the deceased himself was guilty of contributory negligence. All of these questions were raised in the trial court upon a motion for non-suit made at the close of plaintiffs' case, and a renewal of such motion, and a motion for a directed verdict made at the close of all of the evidence.



*SPECIFICATION OF ERRORS.*

## I.

The trial court erred in overruling and denying defendant's motion for a non-suit made herein at the close of the testimony introduced in behalf of the plaintiffs, because the evidence introduced by said plaintiffs was insufficient to make out a case for the jury, in each of the following particulars and for each of the following reasons, to-wit:

(a) The plaintiffs failed to prove any of the charges of negligence set forth in their complaint. It was alleged in the complaint and sought to be proven upon the trial that the defendant was negligent (1) in employing a hoistman, Joe Egbert, who was incompetent, inexperienced, nervous and excitable, and which facts were known to the defendant, and (2) in failing to furnish the deceased with a reasonably safe place for the performance of the duties required of him, and (3) in failing to furnish the deceased with proper, safe, suitable and adequate machinery, tools and appliances for the performance of the work required of him in that the bolts, lugs and keys by which the clutch was fastened to the shaft of the drum of the hoist were loose, worn out, unsafe and inadequate, and that the brake band and clutch were worn out, loose, inadequate and unsafe, and that the clutch and the band thereof could not be adjusted by said lever under the control of the hoistman so as to retard and control the speed of said hoist and prevent the same from attaining a dangerous rate of speed and from



falling to the bottom of said shaft, and (4) that defendant was operating through a vertical shaft more than two hundred and fifty (250) feet in depth without having said shaft equipped with a mine cage, skip or bucket fitted with safety clutches, in violation of the state law, and (5) that the bucket was lowered at a greater speed than six hundred (600) feet per minute in violation of the state law, and (6) that a copy of the Idaho Mining code and a copy of the bell signals had not been properly posted as required by the state law, and (7) that the defendant had not promulgated proper and necessary hoist rules, and particularly a rule requiring the hoist to be raised and lowered before permitting men to be transported therein, and (8) that the defendant was negligent in not having its master mechanic make proper and reasonable inspections of the hoisting machinery and apparatus; but the evidence introduced by the plaintiffs failed to prove any single charge of negligence as set forth in said complaint and herein.

(b) Because it did appear from the evidence introduced by plaintiffs that there was no actionable negligence on the part of the defendant which was the proximate cause of the accident to the deceased complained of in plaintiffs' complaint in this case.

(c) Because it appeared from the evidence that the deceased at the time of his accident was guilty of contributory negligence in, (1) in attempting to descend in the bucket before complying with the rules of the defendant requiring one round trip to be made before

men were hoisted or lowered in said bucket, and (2) in descending before ascertaining whether or not the clutch bolt had been tightened when the deceased knew, or by the exercise of reasonable care should or could have known that by reason of the work in which he and his co-laborers were engaged immediately preceding the accident, that the clutch bolt would necessarily have been loosened, and (3) in attempting to leap from said bucket after it had attained a dangerous rate of speed.

(d) Because it appears from the evidence that the instrumentalities, machinery, and apparatus furnished by the defendant were reasonably safe, adequate and in a good state of repair, and that the accident to the deceased was due to the negligence of a fellow servant, or fellow servants, in not using properly an instrumentality, machine or apparatus which was in itself reasonably safe, but which was rendered unsafe by reason of its improper use by a fellow servant, or fellow servants of the deceased; for the negligence of which said fellow servant or fellow servants the defendant was not responsible.

(e) Because it appeared by the evidence that the deceased knew, or by the exercise of reasonable care and prudence could or should have known and appreciated, the risk to which he was subjected at the time of his accident, (1) because of his knowledge of the work which was being performed immediately preceding his accident and his knowledge of the manner in which such work was customarily performed, and (2) be-

cause he had been advised and informed by the hoistman Lytton that the clutch bolt had been loosened by the men that preceded the deceased and his crew in the work of removing the kinks from the cable, and that deceased therefore assumed such risks, and that his accident resulted from an assumed risk.

(f) Because it appeared from plaintiffs' complaint and the evidence adduced in behalf of the plaintiffs that there was no actionable negligence on the part of the defendant which served as the proximate cause of the accident to the deceased.

(g) Because it affirmatively appeared from the evidence introduced by the plaintiffs that the defendant had performed its full duties of furnishing the deceased with a reasonably safe place to work, with reasonably safe instrumentalities with which to work, with competent co-servants, had promulgated proper and reasonably adequate rules, and had inspected with reasonable frequency and regularity and with reasonable thoroughness the instrumentalities so furnished by it, and had not failed in the discharge of any duty which it owed the said deceased.

## II.

The trial court erred in overruling and denying defendant's motion for a non-suit renewed at the close of all of the testimony and upon the same grounds that the original motion for non-suit was made, and also in overruling defendant's motion for a directed verdict for defendant upon the same and additional grounds at

the close of the whole testimony, because in addition to the grounds and reasons hereinbefore specified, the evidence was insufficient to warrant the submission of the case to the jury, or a recovery by the plaintiff of any sum whatever, in the following particulars:

(a) Because it appeared from all the evidence in the case that the deceased assumed every risk, and the risk of every defect mentioned in the complaint and mentioned in the evidence as grounds of negligence, and that he knew and appreciated and assumed every risk growing out of the several grounds of negligence set forth in said complaint.

(b) Because it appeared from all the evidence that the deceased met with his accident solely and entirely by reason of his own negligence, or his contributory negligence.

(c) Because it appeared from all of the evidence that if the accident was not due to the negligence of the deceased himself, it was due to the negligence of a fellow servant or fellow servants whose negligence was one of the risks assumed by the deceased and for which negligence the defendant is not liable.

(d) Because the evidence in its entirety failed to prove any actionable negligence on the part of the defendant which served as the proximate cause of the accident to the deceased.

### III.

The court erred in giving the following portion of his oral instructions to the jury, to-wit:



"In other words, one who is charged with the duty of performing what it is the master's duty to do, here the defendant company's duty to do, of keeping the mine in safe condition, or the instrumentalities in safe condition, can not be a fellow servant or employe with another, so that in this case if you find that the accident was the result of the negligence of some one who was acting for or in the mechanical department, rather than the operating department, then that is a risk from another employe of the defendant company which the deceased did not assume. He assumed risks from the negligence of fellow employes when those employes were in his department, the mining department, rather than the mechanical department."

#### IV.

The court erred in giving the following portion of his oral instructions to the jury, to-wit:

"And I have to say to you that the evidence very strongly tends to show that the condition of this screw or bolt, or nut is the proximate cause of the injury, or the accident, rather, and is the only immediate cause of the accident. There is some evidence tending to show that the shaft of the drum was sprung. However, the plaintiffs do not allege, and, as I understand, do not claim now, that this sprung condition of the shaft, even if you credit that testimony, directly contributed to the accident. That was brought in only for the purpose of attempting to explain why it was necessary



to loosen this screw, or bolt, or nut. The defendant contends that it was not sprung, and that that is not the reason for loosening the bolt or nut, and the plaintiff contends that it was. But it is not alleged, and it is not now claimed, that the condition of the shaft of the drum in anywise affected the operation of the hoist upon the evening in question at the time the accident occurred. In other words, the clutch would not have held any better had the shaft been in perfect condition, if it was not in perfect condition. The fact, if it be a fact, that the shaft was sprung, did not in anywise affect the hoist man's control of the hoisting machinery at the time in question. There is some evidence also tending to show that certain keys were loose in and about the mechanism which controlled the clutch or had to do with the operation of the drum, but I have to say to you that there is no substantial evidence tending to show that the condition of these keys in anywise affected the hoist man's control of the hoist at that time."

## V.

The court erred in giving the following portion of his oral instructions to the jury, to-wit:

"Now then, gentlemen, if from all of the evidence you find that Mr. Witkouski did not have control of the hoist, that he was not charged with the responsibility of keeping it in repair, if he did not have the direction of the hoist man as to what should be done from time to time in seeing that the

hoist operated properly, but that he could only direct him in so far as giving him the signals and telling him when the hoist should go up and go down, and how rapidly, and so forth, and further that the hoist man, in so far as the mechanical work of keeping this hoist in condition was concerned, was under the control and direction of the mechanical department, ultimately the master mechanic, then you could not find that the hoist man is a fellow servant with the deceased, and therefore the negligence of the hoist man in loosening this screw and leaving it loose, would not be a risk that the deceased would have taken, and if he was injured as a consequence of such negligence then the plaintiffs here could recover."

## VI.

The court erred in giving the following portion of his oral instructions to the jury, to-wit:

"You will see that the whole issue there is as to whether or not the hoist man was under the control of Witkouski so far as the mechanical work was concerned of keeping this hoist in condition, or whether he was under the control and direction of the mechanical department, and therefore was representing the master in the performance of this primary duty of keeping the appliances and instrumentalities in a proper condition of repair."

## VII.

The court erred in giving the following portion of

his oral instructions to the jury, to-wit:

“Perhaps, to sum up, and to state what I have already said to you in a somewhat different way. if you find from the evidence that the witness Lytton, who was the hoist man on the shift immediately preceding him, was under the direction and exclusive command and authority of the master mechanic or general foreman, or both, and that Witkouski had no authority over or right to give orders to or direct said Lytton as to the matter, and things incident to or pertaining to keeping said hoist in a reasonably safe condition of repair and efficiency, and the said Lytton, when he went off shift, left the same in an unsafe condition of repair and efficiency, without notifying the succeeding engineer, Egbert, of such condition, and that his failure to so notify said Egbert was the proximate cause, or contributed to the death of the deceased Witkouski, then you should find for the plaintiffs.”

## VIII.

The trial court erred in entering judgment for plaintiffs and against the defendants herein for the sum of Fifteen Thousand (\$15,000.00) Dollars upon the verdict of the jury, and in entering the judgment for the amount of said verdict.

SPECIFICATIONS WHEREIN THE EVIDENCE  
IS INSUFFICIENT TO SUSTAIN THE  
VERDICT OF THE JURY AND  
JUDGMENT THEREON.

The evidence is insufficient to sustain the verdict of the jury and the judgment thereon in the following particulars and for the following reasons, to-wit:

I.

There is no evidence that the defendant was negligent in employing and keeping in its service the hoist man operating the hoist at the time of the accident, or that said hoist man was incompetent, inexperienced, nervous, or excitable, but on the contrary the evidence affirmatively shows that said hoist man, except upon this single occasion, was a careful, prudent man.

II.

There is no evidence that the defendant failed to furnish the deceased with a reasonably safe place to work, but on the contrary the evidence affirmatively shows that the place where deceased was called upon to perform his duties was reasonably safe.

III.

There is no evidence that the defendant was negligent in failing to furnish to the deceased proper, safe, suitable, and adequate machinery, tools and appliances for the performance of the work required of him, or that the bolts, lugs and keys by which the clutch was

fastened to the shaft of the drum of the hoist were loose, worn out, unsafe, and inadequate, or that the brake band and clutch thereon were worn out, loose, inadequate, and unsafe, or that said clutch and the band thereof could not be adjusted by said lever under the control of the hoist man so as to retard and control the speed of said hoist, but on the contrary the evidence affirmatively shows that said hoist was in reasonably safe condition.

#### IV.

There is no evidence that the shaft in which deceased was working was not equipped with a cage, skip, or bucket fitted with safety clutches, but on the contrary the evidence shows that said shaft was equipped with a proper bucket fitted with safety clutches.

#### V.

There is no sufficient evidence to show that the men were lowered by the defendant into its shaft at a greater speed than six hundred (600) feet per minute, but on the contrary the evidence does show that the defendant had promulgated a rule restricting the speed to less than six hundred (600) feet per minute and that if said rule, or said law was violated, it was only upon the single occasion when the deceased met with his accident and was due to the negligence of a fellow servant.

#### VI.

That there was no evidence that the defendant was



negligent in not promulgating proper and necessary hoist rules and regulations, and particularly a rule requiring the hoist to be raised and lowered before permitting men to be transported therein, but on the contrary the evidence does show that such rules had been promulgated and that their non-observance upon the occasion of the accident to the deceased, if such rules were not observed at said time, was due to the negligence of the deceased himself, or to the negligence of a fellow servant.

## VII.

There is no evidence that the defendant was negligent in not having its master mechanic make proper and reasonable inspections of the hoisting machinery and apparatus, but on the contrary the evidence affirmatively shows that reasonable and proper inspections of said hoisting machinery and apparatus were required to be made and were in fact made by the defendant's master mechanic.

## VIII.

There is no evidence of any negligence on the part of the defendant which was the proximate cause of the accident to the deceased. While the evidence does disclose the fact that a short time prior to the accident to the deceased, the hoist man on the preceding shift had loosened the clutch bolt, and while there is some evidence that the loosening of this bolt was made necessary by reason of the drum on the shaft being slightly sprung, and while there is evidence tending to show that said hoist engineer had failed to tighten said clutch

bolt, or report his failure to do so to the succeeding hoist man, yet the evidence affirmatively shows that said hoist could still be controlled by the hoist man by means of the proper application of the compressed air and by means of a brake provided for that purpose, and that the rapid descent of the bucket at the time of the accident was due to the failure of the hoist engineer to properly operate said hoist, and not to the sprung condition of the drum, nor to the loosened condition of such clutch bolt.

## IX.

The evidence discloses that the proximate cause of the accident to the deceased was due to the negligence of a fellow servant or servants. In this respect the evidence shows that Lytton, the hoist man on the crew preceding the crew of the deceased, had loosened the clutch bolt, and that all of the men upon said preceding crew had been engaged in the operation of taking the kinks out of the cable; that when the deceased and his crew went on shift the work of taking the kinks out of the cable had not been completed and that deceased and his crew continued the work of the preceding crew; the evidence shows that all of the men on both of these crews were, as a matter of law, fellow servants, and that whether the proximate cause of the injury was (as stated by the trial court) the loosening of the clutch bolt and the failure to tighten same, or was the careless operation of said hoist by the hoist engineer, that in either case the negligence which served as the proximate cause for the injury was the negligence of a fellow workman.

## X.

The evidence discloses that the deceased had on other occasions assisted in taking kinks out of the cable and knew that it was customary to loosen the clutch bolt to permit of the easier unwinding of the cable; the deceased knew that this had been done when he went to work on the night of his accident; the evidence discloses that without enforcing the rule which required the hoist to be lowered and raised before permitting men to be carried thereon, and without ascertaining whether the clutch bolt had been tightened, the deceased with his men stepped upon the bucket and ordered the lowering thereof; and the evidence shows that in doing so the deceased assumed the risk and every risk of descending in the bucket under the above mentioned conditions and circumstances.

## XI.

And for the same reasons and in the same particulars as mentioned in the last foregoing specification, the deceased was guilty of contributory negligence in descending in said bucket under the conditions mentioned in the last foregoing specification, and the evidence further discloses that the deceased had been warned that said clutch bolt had been loosened and was therefore guilty of gross negligence in descending in said bucket without ascertaining whether or not the said clutch bolt had been tightened.

And the evidence further discloses the fact that the men who remained on the bucket were not injured

and that the accident to the deceased was due to his negligence in leaping from said bucket.

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### ARGUMENT.

*There is no proof in this case of actionable negligence on the part of the defendant, but on the contrary the evidence does show that the defendant performed its full duty under the law toward the deceased.*

(Specification of Errors, Numbers I a, b, d, f, g; II a and d).

It may readily be conceded that it is the nondelegable duty of the master to exercise ordinary and reasonable care, or the care and skill that a man of ordinary prudence would observe under the circumstances, to furnish his servants with a reasonably safe place to work, and with reasonably safe machinery, appliances, tools and instrumentalities with which to work, and to keep such instrumentalities in reasonably safe repair, and to employ competent and sufficient employees, and to establish, promulgate, and enforce reasonable rules for the safe conduct and regulation of his business. (4 Thompson's Commentaries on the Law of Negligence, Sec. 3767), and that for the failure to perform, or the negligent performance of any of these duties, the master is liable when it appears that such negligence was the proximate cause of the servant's injuries.

The duty of the defendant in this case was to ex-



ercise such watchfulness, caution and foresight as under all the circumstances of the particular situation, a corporation controlled by careful and prudent officers or agents ought to exercise.

*Wabash R. Co. v. McDaniels*, 107 U. S. 454; 27 L. Ed. 605.

*F. C. Austin Mfg. Co. v. Johnson*, (C. C. A. 8th Cir.) 89 Fed. 677.

*Atchison T. & S. F. Co. v. Moore*, 29 Kan. 632-644.

The expression of the rule as to the employer's duty as found in the case last above cited is quoted with approval by the Supreme Court of the United States in

*Baltimore & Ohio R. Co. vs. Baugh*, 149 U. S. 368-387; 37 L. Ed. 781.

"A master assumes the duty towards his servant of exercising reasonable care and diligence to provide the servant with a reasonably safe place at which to work, with reasonably safe machinery, tools and implements to work with, with reasonably safe materials to work upon, and with suitable and competent fellow servants to work with him; and when the master has properly discharged these duties, then, at common law, the servant assumes all the risks and hazards incident to or attendant upon the exercise of the particular employment or the performance of the particular work, including those risks and hazards resulting



from the possible negligence and carelessness of his fellow servants and co-employees. And at common law, whenever the master delegates to any officer, servant, agent, or employe, high or low, the performance of any of the duties above mentioned, which really devolve upon the master himself, then such officer, servant, agent, or employe stands in the place of the master, and becomes a substitute for the master, a vice principal, and the master is liable for his acts, or his negligence to the same extent as though the master himself had performed the acts or was guilty of the negligence. But at common law, where the master himself has performed his duty, the master is not liable to any one of his servants for the acts or negligence of any mere fellow servant or co-employe of such servant, where the fellow servant or co-employe does not sustain his representative relation to the master."

And it is the master's duty to furnish such machinery and apparatus as is adequate and suitable for the work to be done, and to keep and maintain the same in such condition as to be reasonably safe for use. (*Gardner v. Michigan Central R. R. Co.* 150 U. S. 349; 37 L. Ed. 1107).

The master, however, is in no respect an insurer or guarantor, and does not warrant the safety or sufficiency of his premises, machinery, tools, appliances; or the competency or fitness of the servants whom he selects to carry on his work, or the sufficiency of the rules and regulations which he may have established

for the conduct of his work; he is bound only to use reasonable care. (4 Thompson's Commentaries on the Law of Negligence, Sec. 3767).

It becomes, then, a question of prime importance to determine whether the defendant in this case did use reasonable care in the performance toward the deceased of its nondelegable duties.

It was charged in the complaint as one ground of negligence that the defendant had failed to furnish the deceased with a reasonably safe place in which to perform his work and labors, but no evidence was introduced upon this question, and the case was not tried upon the theory that defendant had failed in the discharge of this duty, and we conceive this question to be out of the case.

The only servant whose competency was ever questioned was the hoist man, Joe Egbert, who, it was alleged in the complaint, was incompetent, nervous and excitable. But both by a failure to attempt to prove this charge, as well as by the express admission of counsel that they had failed to prove the same, this ground of negligence is also out of the case.

If the plaintiff is permitted to finally recover in this case it must be upon the theory that the defendant failed in the discharge of its duty to furnish the deceased with reasonably safe instrumentalities, and failed to keep said instrumentalities in reasonably safe condition and repair, and failed to properly inspect the same.

The instrumentalities in question were the hoisting apparatus, and the bucket used in conjunction therewith, in the work of sinking a new shaft on the defendant's property.

As to the bucket, no evidence was introduced tending to show that it was of a kind or character unfit for the work, or was in anything but the best condition. On the contrary the evidence of plaintiffs' own witnesses does show that it was customary wherever a shaft is being sunk, and before it has finally been finished, to use a bucket rather than a cage and that the buckets usually used were of the same general type as the one used by defendant in this shaft at the time of the accident (Testimony of Edw. P. Moran, p. 50).

"Q. And it is customary where a shaft is being sunk, and before it has finally been finished up, to use a bucket rather than a cage, is it not?

"A. Yes, sir.

"Q. That is always the custom?

"A. Yes, sir.

"Q. And the buckets used elsewhere where you have worked were of the same general type as this bucket?

"A. They were."

And the bucket was provided with safety cross-head in accordance with the Idaho State law. (Testimony of Edw. P. Moran, pp. 58 and 59). And counsel

for plaintiffs finally admitted that they could no longer base a charge of negligence on the kind or character of bucket used, or its not having been supplied with statutory safety devices, (pp. 165-166). And finally as to this particular instrumentality, the evidence shows that nowhere, except in the complaint, has there been the slightest claim that the bucket and cable used were not of the usual kind, and of a proper type, properly installed and properly used at the time of the accident.

The hoist itself was comparatively new, having been built in 1914, approximately two years prior to the accident (Testimony of G. C. Karr, p. 226). It was the same general type of hoist used in such work. Mr. Karr testified (pp. 222 to 225) that there was no particular difference between this hoist and other kinds of different makes, that they are practically all alike. And on this question we are finally aided by the admission of plaintiffs' counsel that the hoist itself was a proper kind and of sufficient capacity (p. 228) and that his only contention was that it was not in proper condition at the time of the accident.

On the question of the inspections which were made of this hoist, there is the testimony of one witness only to-wit: Edw. E. Hughes, the defendant's master mechanic. This witness testifies (p. 231) that immediately prior to the 18th day of May, 1916, the day on which the deceased met his death, that he, the master mechanic, was personally inspecting the machinery used at the defendant's mine; that he inspected



such machinery daily and that he had inspected this particular hoist between 7:30 and 9:00 o'clock on the night of May 17th, being the night before the accident (p. 231) at which time he inspected the cable and clutch, the brake, and the bearings and the drum shaft and found everything to be in good condition. As the accident happened about 11:00 o'clock p. m. on May 18th, this last inspection was approximately twenty-six hours immediately preceding the accident. The testimony of Mr. Hughes is absolutely uncontradicted as to the making of this or other inspections, or as to the custom of inspecting the machinery daily, and the plaintiffs did not attempt to prove, although charging it in their complaint, that the defendant had failed to provide an adequate system of inspections, or had failed to make proper or reasonable inspections, and the undisputable evidence in the case is that reasonable inspections were made prior to the accident.

Taking up now the actual condition of the hoist. The only testimony which in any way criticises its condition was that of J. H. Lytton, who was the engineer who had loosened the clutch bolt and failed, not only to tighten the same, but also to report the fact of its loosened condition to the succeeding hoistman; although as we have stated before he may possibly be excused for this oversight in the face of the evidence that he did report to Witkouski that the clutch bolt was loose. Lytton says that the drum shaft was sprung on the hoist, and that for this reason it was necessary in unwinding the cable to loosen the clutch bolt.



and also describes some conditions which had led to what he describes as "lost motion" between the shaft on the drum and the clutch bands. In this connection it should be noted that no fault is found by the plaintiffs in this case with the condition of the shaft or the drum, or the drum itself and that the sprung condition of this shaft was not one of the charges of negligence in the complaint. Lytton further testifies, however, that even when the clutch bands were completely loosened the hoist could still be controlled and instantly stopped by the application of the brakes. He says:

"Q. In case this clutch was loose, would your engine have any retarding effect at all when you tried to lower the men down?

"A. No, sir, not if the clutch was loose.

"Q. How long would it take you before you could apply the emergency brakes if you found the engine wouldn't hold it?

"A. *In an instant.*" (P. 125).

and again

"Q. How far could it have dropped before you could have stopped it?

"A. Well, if a man is looking what he is doing he will never let it drop no distance.

"Q. Providing he can do it quick enough?

"A. Well, you can work—you have always got

a firm pressure with your brake all the time.

“Q. If you didn’t anticipate it you wouldn’t be prepared would you?”

“A. The chances are that bucket may drop ten feet with you before you would realize just what happened.” (P. 126).

It will be observed from this testimony, that irrespective of any alleged defect in the drum of the hoist, and irrespective even of the loosened clutch, the hoist could still be perfectly controlled by the engineer if as plaintiffs’ witness says “if a man is looking what he is doing.” So that the charge of negligence complained of in this case finally goes right back to the *carelessness of Egbert in the actual operation of the hoist*. The shaft may have been sprung, Lytton may have been negligent in loosening the clutch bolt, and the doing of this act may have been necessary because of the sprung condition of the shaft; Lytton may have been negligent in not reporting this fact to Egbert, or even in not reporting this fact to Wtikouski, and Egbert may have been negligent in not tightening the clutch bolt before commencing the work of lowering the men, *but irrespective of all these facts, had Egbert been careful in the manner of operating the hoist, the hoist would still have worked properly and the accident would have been avoided.*

It was urged in the trial court upon defendant’s motion for a non-suit, and for a directed verdict, but the plaintiffs had signally failed in their attempt to

prove any of the charges of negligence set forth in their complaint, and which have heretofore been enumerated in this brief. The trial court took the position, to quote his own statement, that "it cannot be questioned that the failure to tighten the screw before using the hoist constituted negligence on the part of some one." But if this be the negligence upon which the plaintiffs now claim the right to recover, then the defendant was deceived by plaintiffs complaint, for nowhere in that document is there any suggestion of this charge of negligence. It was not alleged in the complaint that the accident had been caused by the loosening of this clutch bolt and the failure to tighten the same, but it is, rather, the allegation of the complaint that the accident was caused by the careless operation of the hoist by Egbert, due, as it was alleged in the complaint, to the fact that he was nervous, excitable and inexperienced. Apparently, sometime between the drawing of this complaint and the trial of the action, counsel for plaintiffs discovered the fact that if they relied upon the carelessness of the hoistman in the operation of the hoist, they would be met by the legal defense that Egbert was a fellow servant, and it, therefore, become necessary to evade this question and seek to recover under some other theory.

*The negligence, if any, which served as the proximate cause of this accident was the negligence of a fellow servant, and was one of the risks assumed by the deceased, and for damages growing out of such negligence the heirs of deceased cannot recover.*

As a general proposition, all who enter the employment of a common master to accomplish a common undertaking are *prima facie* fellow servants, although their grades of service are different, and although some direct and supervise the men subject to their command and their work, while others perform the labor.

*Weeks v. Scharer* (C. C. A. 8th Cir.) 111 Fed. 330.

Where fellow servants are engaged in a common employment, each of them in entering the service assumes the risk that the other may fail in that care and vigilance which are essential to his safety.

*N. P. R. R. vs. Herbert*, 116 U. S. 642; 29 L. Ed. 755.

*Weeks v. Scharer, supra.*

And while considerable time was spent in the trial of this case in the introduction of testimony tending to prove or disprove that Witkouski was the boss of the shaft crew, and that he did, or did not, exercise supervision over the hoist man, we are not satisfied that this is of any great importance one way or the other. If, at the time of this accident, Egbert and Witkouski were engaged by a common master, in a common employment which brought them into such contact, one with the other, that each would know that his safety might be endangered by the negligence of the other, then they were fellow servants, irrespective



of the grade of their employment, or whether one exercised supervision over the other.

As we understand the position of the Court, however, in sending this case to the jury, His Honor took the position that for the time being at least Egbert and Witkowski were employed in different departments of the master's business.

The first case we have noticed in the Federal Courts which discussed the question as to whether or not persons employed in different departments of the work are fellow servants is *Randall vs. B. & O. R. R.*, 109 U. S. 478; 27 L. Ed. 1003.

In that case a brakeman of one train had left his train to turn a ground switch in one of the railroad yards of the defendant; while working at this switch, and not being entirely familiar with that kind of a switch, he was struck by an engine running on another track. The negligence charged was that the engine man on the train which struck the plaintiff had not complied with the State laws in regard to the blowing of the whistle and the ringing of the bell. The defense was that the brakeman on the one train, and the engine man on the other train were fellow servants. The Court in discussing this question says:

"The general rule of law is now firmly established, that one who enters the service of another takes upon himself the ordinary risks of the negligent acts of his fellow servants in the course of the employment. This Court has not hitherto had occa-



sion to decide who are fellow servants, within the rule. In *Packet Co. v. McCue*, 17 Wall. 508 (84 U. S. XXI, 705) and in *R. R. Co. v. Fort*, 17 Wall. 553 (84 U. S. XXI, 739), the plaintiff maintained his action because at the time of the injury he was not acting under his contract of service with the defendant; in the one case, he had wholly ceased to be the defendant's servant; in the other, being a minor, he was performing, by direction of his superior, work outside of and disconnected with the contract which his father had made for him with the defendant. In *Hough v. R. Co.* 100 U. S. 213 (XXV., 612), and in *R. Co. v. McDaniels* (ante, 474), the action was for the fault of the master; either in providing an unsafe engine, or in employing unfit servants.

“Nor is it necessary, for the purposes of this case, to undertake to lay down a precise and exhaustive definition of the general rule in this respect, or to weigh the conflicting views which have prevailed in the courts of the several states; because persons standing in such a relation to one another as did this plaintiff and the engine man of the other train, are fellow servants, according to the very great preponderance of judicial authority in this country, as well as the uniform course of decision in the House of Lords, and in the English and Irish courts, as is clearly shown by the cases cited in the margin. \* \* \* *They are employed and paid by the same master. The duties of the two bring them to work at the same place at the*

*same time, so that the negligence of the one in doing his work may injure the other in doing his work.* Their separate services have an immediate common object, the moving of the trains. Neither works under the orders or control of the other. Each, by entering into his contract of service, takes the risk of the negligence of the other in performing his service; and neither can maintain an action, for an injury caused by such negligence, against the corporation, their common master."

The above case was decided in 1883. Thus early did the Supreme Court of the United States adopt the view that where the work of the two servants brought them at the same place, at the same time, so that the negligence of one might work to the injury of the other, that they were fellow servants even though engaged in different branches of the work and in different capacities.

The Randall case was discussed at length by Justice Brown in the case of *N. P. R. Co. v. Hambly* (154 U. S. 349), 38 L. Ed. 1009. In the latter case the plaintiff was a common laborer, working for the railroad company under the direction of a section boss on a culvert and was injured by a passing train through the negligence of the engineer and conductor. We invite the Court's careful attention to the entire opinion in this case, discussing as it does all of the cases involving gradations of rank between persons in the employment of a common master, which had been decided by the Supreme Court up to that time (1894). In refusing

to hold that the plaintiff, because engaged in a different department of the work, was not a fellow servant with the engineer and conductor of the passenger train, Justice Brown says:

“To hold the principal liable whenever there are gradations of rank between the persons receiving and the persons causing the injury, or whenever they are employed in different departments of the same general service, would result in frittering away the whole doctrine of fellow service. Cases arising between persons engaged together in the same identical service, as, for instance, between brakemen of the same train or two seamen of equal rank in the same ship, are comparatively rare. In a large majority of cases there is some distinction either in respect to grade of service, or in the nature of their employments. Courts, however, have been reluctant to recognize these distinctions unless the superiority of the person causing the injury was such as to put him rather in the category of principal than of agent, as, for example, the superintendent of a factory or railway, and the employments were so far different that, although paid by the same master, the two servants were brought no farther in contact with each other than as if they had been employed by different principals.”

And in line with the above statement from our highest Court it may be observed in this case that far from Joe Egbert exercising supervision over Witkout-

ski, it is more probable from the evidence that Witkowski exercised a supervising authority over Egbert.

In the above mentioned case Justice Brown cites with approval the case of *Quebec Steamship Co. v. Merchant* 133 U. S. 375; 33 L. Ed. 656.

In the latter case the plaintiff was one of a ship's crew. The entire crew consisted of some thirty-three persons and was divided into three classes of servants, called three departments, viz., the deck department, the engineer's department, and the steward's department. The captain, the first and second officers, the purser, the carpenter and the sailors were in the deck department. The engineers, the firemen and the coal passers were in the engineer's department; the steward, the waiters, the cooks, the porter and the stewardess were in the steward's department. The plaintiff was the stewardess, working in the last mentioned department. The ship had stopped at the Island of Trinidad to let off some passengers, which was done by raising certain rods which permitted the opening of the gangway. After the passengers and baggage had been discharged the carpenter and the porter attempted to replace the rods in their proper position and thus close the gangway. A sudden rain came up and the carpenter and porter having placed the gangway in position and without fastening the hooks which held the same, left it in that condition until the rain should cease. In the meantime the stewardess came to empty something over the side of the ship and when she leaned against the gangway, it gave way, and she fell from the ship,



striking a nearby boat and sustaining severe injuries. The accident was due to the failure of the carpenter, one of the laborers in the deck department, to place the rods which held the gangway in proper position and to fasten the same. The defense was that the negligence was that of a fellow servant. The lower court refused to direct a verdict for the defendant, in reversing which judgment the Supreme Court speaking through Mr. Justice Blatchford, said:

“We think the court ought to have directed the jury to find a verdict for the defendant, on the ground that the negligence was that of a fellow servant, either the porter or the carpenter. As the porter was confessedly in the same department with the stewardess, his negligence was that of a fellow servant. The contention of the plaintiff is that, as the carpenter was in the deck department and the stewardess in the steward’s department, those were different departments in such a sense that the carpenter was not a fellow servant with the stewardess. But we think that, on the evidence, both the porter and the carpenter were fellow servants with the plaintiff. The carpenter had no authority over the plaintiff, nor had the porter. They and the plaintiff had all signed the shipping articles; and the division into departments was one evidently for the convenience of administration on the vessel, and did not have the effect of causing the porter and the carpenter not to be fellow servants with the stewardess.”



See also:

*Baltimore & Ohio R. R. Co. v. Baugh*, 149 U. S. 368; 37 L. Ed. 772.

*Central R. R. Co. v. Keegan*, 160 U. S. 259; 40 L. Ed. 418.

We contend that, even adopting the view of the Court that Egbert was temporarily a servant of the mechanical department, and even though Witkouski was still a servant of the operating, or mining department, that under this decision, as well as others, which we will in a moment cite, the work which these two men were jointly engaged in prosecuting, viz., the sinking of this new shaft, brought them into such close contact that each must necessarily have anticipated that his safety might be endangered by the carelessness of the other, and that, to quote from the Hambly case, "it would be frittering away the whole doctrine of co-service to hold that these men were not fellow servants because employed in different departments of the work."

The case of *Quebec Steamship Co. v. Merchant*, *supra*. is indistinguishable in principle from the present action; as are also:

*Buckley v. Gould* (C. C. Nev.) 14 Fed. 833.

*Hermann v. Port Blakely Mill Co.* (D. C. Cal.) 71 Fed. 853.

*Spring Valley Coal Co. v. Patting* (C. C. A. 7th Cir.) 86 Fed. 433.

*Theleman v. Moeller* (Iowa) 34 N. W. 765.

*Bradbury v. Kingston Coal Co.* (Penn.) 27 Atl. 400.

*Williams v. Verona M. C.*, 149 Mich. 45; 112 N. W. 496.

The chief question in *Buckley vs. Gould, supra.*, was whether the engineer of a steam engine employed in lowering men into a mine was a fellow servant in the same line or department of service with the men working at the bottom of the shaft. Circuit Judge Sawyer held that they were. Judge Sawyer cites a great many cases in support of his conclusion, and among other things says:

“But the foundation of this action is that the accident was the result of the carelessness of the man who was running the engine. He was not an agent of the company. He had no authority over the plaintiff. He was merely a workman running an engine under the direction of a chief engineer, a general foreman, and a superintendent of the mine. It was not his business to furnish the engine. He had no authority whatever. He was co-operating with plaintiff in sinking the shaft. He was simply a fellow servant co-operating in sinking the shaft. We do not think it makes any difference whether he was running an engine, or working with a wheel and axle, a pulley and bucket, or carrying the material up and down a ladder upon his shoulders. He was doing the same work,

but doing it by a different means. Every man below performed his part of the work in sinking the shaft—the work in which they were all engaged. They were working together in the same department in excavating this shaft. The fact that the engine-runner, as he is called, was using a different instrument in carrying the material up and supplies down makes no difference. It was work done in a common employment to accomplish a common end—the sinking of a shaft. One servant performed one part, and another another part.”

In *Hermann vs. Port Blakely Mill Co.*, *supra.*, the plaintiff was the mate of a vessel. At the time of the accident he was engaged, with a number of men on board the vessel, in loading lumber from a nearby dock. A chute had been erected from the dock to the vessel and the lumber was placed in the chute and allowed to slide down into the vessel. In the discharge of its nondelegable duty to warn the men below when lumber was placed in the chute, the master had designated one of the men on the wharf to give a warning cry whenever a piece of lumber was placed in the same in order to enable those below to get out of the way. And if this warning cry was given there was no danger to the men below, as the place where they were working was in itself proper and safe. The men on the wharf failed to give the warning at the time a large piece of lumber was sent down the chute and the plaintiff was struck and severely injured. The decision is by Judge Morrow. In stating the issue in the case the Court said:

“The question then occurs, is the employer, the Port Blakely Mill Company, liable to the libelant for this negligence of his co-employee? It is contended by counsel for defendant that the company can not be held responsible, because libelant was a fellow servant with the employee whose duty it was to give the warning signal, and that he was not injured through any fault or omission of duty which the company, as employer, owed to its employees. The libelant’s counsel argues that this contention is not sound, for the reason that among the positive duties and obligations which the employer owes to his employees, is that of providing a safe place for the employees in which to work; that, applying this rule to the case at bar, it was necessary for the maintenance of that safety to give warning as each piece of lumber was sent down into the hold of the vessel; and that the giving of this warning was one of the duties which the law imposes upon the master personally, for failure to perform which, whether it be his personal negligence or of his servant, acting in his stead, damages may be awarded.”

The Court then discussed the general duty of the master to furnish a safe place to work, and concedes that duty to be a positive and personal one, and then says:

“The question here is whether the negligence of the person on the wharf whose duty it was to give the warning signal, and who failed to do so, was a breach of the master’s duty to furnish libelant a



reasonably safe place to work in, or whether it was the negligence of a fellow servant, not engaged in the performance of a positive duty required of the master. It is important to observe in this connection that libelant was not injured by reason of any defect or inherent danger in the premises or place where he was engaged in working, which the master knew or should have known, and which libelant did not know; but he was injured solely by reason of the fact that the person whose duty it was to give the warning signal omitted to do so. No question was raised at the hearing as to the safety of the hold and between decks, so far as the place itself was concerned, nor as to the sufficiency and fitness of the implements and instrumentalities used in loading, nor as to the competency of the person whose duty it was to give the signal to discharge that service. No negligence on the part of the company in employing and selecting the particular individual to give the warning was shown, and, so far as that feature of the case is concerned, it may be taken as conceded that he was competent. The legal presumption is that he was competent, and that the master discharged his duty to the libelant in that respect, no proof to the contrary having been submitted."

And again:

"The contention of counsel for libelant is that the place where libelant was working was rendered unsafe by reason of the fact that the person



on the wharf whose duty it was to give the warning failed to do so, and that this negligence constituted a breach of duty on the part of the master to furnish a safe place for libelant to work in. The word "place," in my judgment, means the premises where the work is being done, and does not comprehend the negligent acts of fellow servants, by reason of which the place is rendered unsafe or dangerous. The fact that the negligent act of a fellow servant, renders a place of work unsafe is no sure and safe test of the master's duty and liability in this respect, for it may well be said that any negligence which results in damages to some one makes a particular spot or place dangerous or unsafe. To so hold would virtually be making the master responsible for any negligence of a fellow servant which renders a place of work unsafe or dangerous. It would be doing the very thing which it is the policy and object of the general rule not to do. It would create a liability which the master could not avoid by the exercise of any degree of foresight or care. In this case the person who was detailed to give the warning signal, and omitted to do so, was, undoubtedly, both in reason and upon authority, a fellow servant of libelant. They were both engaged in a common employment, viz, that of loading lumber; both were employed and paid by the same common master, The Port Blakely Mill Company."

The entire opinion in this case is instructive and directly applicable to the question in the present action.

*Spring Valley Coal Co. v. Patting, supra.*, is also directly in point. The plaintiff had been injured while being lowered in a skip or bucket to the bottom of the shaft in defendant's mine. The falling of the bucket at great speed was due to the fact that the hoist engineer had failed to expel the water from the cylinder of the engine. There was no defect in the reversing apparatus, the accident was simply due to the negligence of the hoistman in performing his duty, and the Court held that the hoist engineer and the plaintiff were fellow servants, and that the plaintiff for that reason could not recover.

An effort, doubtless, will be made by plaintiff's counsel to distinguish this case from the case at bar by urging that in the Patting case the accident was due to unskillful operation of the instrumentality, while it will be claimed that in the present case the accident was due to the loose clutch bands. But it will be remembered that the undisputed evidence is that irrespective of any condition of the clutch and the clutch bands, the hoist was still under perfect control of the engineer by means of the brake and the air.

In *Theleman v. Moeller, supra.*, the plaintiff was employed to operate a machine for sawing: he was injured by reason of the carelessness of the engineer in charge of the engine which supplied the motive power to run the saw. The particular negligence complained of was that the engineer, whose duty it was not only

to operate the engine, but also to inspect the same and keep it in good condition and to supply defects and to make repairs, had failed in the performance of those duties. Nevertheless, the Supreme Court of Iowa held that the operator of the machine was a fellow servant with the engineer who was performing the duties of the master in inspecting and keeping the machine in repair. The duties of the engineer in the above case extended to the repairing of the saw and machine itself upon which the plaintiff was employed at the time of his injuries.

In *Bradbury v. Kingston Coal Co.*, *supra.*, the defendant's hoist engineer, while lowering a number of men, including the plaintiff, into the shaft, lost control of the hoisting apparatus. This, it was claimed, was due to the breaking of a cotter pin. The engineer then undertook to stop the engine by application of the reverse lever, but by pulling the lever too far he reversed the engine instead of stopping it. The deceased had then attempted to jump on a landing but had failed and was killed. The other men, as in the case at bar, who stayed in the bucket were uninjured. The discussion of the cause of the accident found at page 403 of the opinion is particularly applicable to the point which we have been endeavoring to make, that is, that the loosened clutch bands, by whatever means they became loosened, was not the proximate cause of Witkowski's accident; that this condition only gave rise to the necessity to use the braking apparatus supplied for just such contingencies, and that it was the failure of the

hoist engineer to properly use this brake which caused the accident. We quote from this decision:

“In the third place, the dropping out of the pin did not cause the accident. Ordinarily, in cases of this kind, the injury or death resulting from defective machinery is immediately caused by the defective appliance, machine, or apparatus, and it is therefore against defendant. But here neither the pin, nor the lever which it held in place, inflicted any injury upon anyone. It only gave occasion for the engineer to arrest the further descent of the cage, which he did. What took place after that was only what might have taken place upon any occasion for stopping the cage; that is, the engineer, wishing to raise the cage a few feet, to the top of the shaft, made a mistake in drawing his reverse lever a trifle too far, and so produced a greater elevation of the cage than was necessary or than he intended. And even this mistake of the engineer was not the sole cause of the accident, for, had the deceased miner remained on the cage nothing that was done, or had occurred, or was omitted to be done would have caused the accident. The accident was the result of a mistaken judgment of the deceased as to the fact of his being in danger. He was in reality in no danger, but he, being one of three, all of whom were in the same exigency, thought he was in danger, and jumped, and lost his life as a consequence of his jump, while the other two, thinking differently



upon the same subject, remained on the cage and were not harmed."

The Court held (page 401) that the engineer was a fellow servant of the deceased and for his mistake, whether negligent or otherwise, the defendant company was not liable.

In the Baugh case (149 U. S. 385; 37 L. Ed. 780), Mr. Justice Brewer after discussing at length the question of when employes were and were not co-servants, and seeking a test by which to determine the status of different employees, says that the true test is "rightfully this, there must be some personal wrong on the part of the master, some breach of positive duty on his part. If he discharges all that may be called positive duty, and is himself guilty of no neglect, it would seem as though he was absolved from all responsibility, and that the party who caused the injury should be himself alone responsible."

Applying this test to the case at bar, one would seek in vain for any breach by the defendant of a personal obligation to the deceased. Indisputably it had discharged all of its personal duties and obligations, and particularly it had furnished its servants with safe instrumentalities, and the neglect which was responsible for the accident to the deceased consisted, at the most, of making unsafe an instrumentality which at the time it was furnished by the defendant was entirely safe and in perfectly usable condition.

*And the negligence which served as the proximate*



*cause of the accident to the deceased was not only the negligence of a co-servant, but such negligence was in relation to the details of the work being done.*

There exists a well recognized distinction between defects or dangers which constitute part of the details of the work being done, and those which do not; and a master who has furnished a reasonably safe place in which to work, and reasonably safe instrumentalities with which to work, and has properly inspected the same, can not be held liable to a servant whose fellow servant has, by his negligence, rendered that place or those appliances unsafe, without the master's fault or knowledge.

In the instant case the instrumentality was safe; it was inspected a short time before the accident, and a short time after the accident, and at both times is shown to have been safe. If, in the interim between these two inspections it was at any time unsafe, a fact which we do not admit, it was made so by the deliberate act of a servant, who in performing a detail of the work, found it more convenient to make an adjustment upon the instrumentality. It was no part of the master's duty either to loosen the clutch bolt on this hoist, or to tighten the same; this was an act unnecessary to perform, and one which the servant in question did merely for the convenience of himself and the men working with him. To hold that in doing this act the servant was performing a nondelegable duty of the master to repair or keep the instrumentality in usable condition, would be to hold that it was the duty of the master to

be personally present at all times to see that no changes and no adjustments were made in the machinery by the servant intrusted with its operation, which might endanger his co-laborers.

See:

*Herrmann vs. Port Blakely Mill Co.*, cited *supra*.

*Baird vs. Reilly*, 92 Fed. 884.

*Gulf Transit Co. vs. Grande*, 222 Fed. 817.

*Cybur Lumber Co. vs. Erkhart*, 238 Fed. 751.

*American Bridge Co. vs. Seeds*, 144 Fed. 605.

*Cleveland C. C. & St. L. Ry. vs. Brown*, 73 Fed. 970.

It was said by Judge Cochran in *Kinnear Manufacturing Company vs. Carlisle*, 152 Fed. 933, that the positive, personal and nondelegable duty of the master to provide a reasonably safe place in which to work, and reasonably safe appliances with which to work, and a reasonably safe method of doing the work, is a duty of *construction* and *provision*, and not of operation (citing *Pennsylvania Co. vs. Fishback*, 123 Fed. 465; *American Bridge Company vs. Seeds*, *supra*). In the present case it is no longer open to argument that the master had provided a safe instrumentality, and that the accident was due to the unsafe manner of operation. It is the personal duty of the master to furnish and provide the safe instrumentality, but it is not his per-

sonal duty to safely use such instrumentality; that is the duty of the servant.

Nor is the fact that the defendant did not pleading its affirmative defenses allege that the death of Witkouski was caused by the negligence of a fellow servant affect the question, although, apparently, this was made the basis of the Court's refusal to take the case from the jury upon that ground. For a plaintiff, seeking to recover damages on account of the negligence of a defendant, is required to prove more than mere negligence in the abstract,—he must assert and prove actionable negligence as distinguished from the negligence of a fellow servant, and the like, for which the injured party can not recover.

And it is expressly held in *Pennsylvania Co. vs. Fishback*, 123 Fed. 465 (59 C. C. A. 269), and in *Morgan Construction Co. vs. Frank*, 158 Fed. 964, that it is not necessary that the defendant shall specially plead the act or the negligence of a fellow servant as a defense.

In fact a reading of Sec. 4221 of the Idaho Revised Codes, which in terms makes contributory negligence a matter of defense and provides that in actions based on negligence it shall not be necessary for the plaintiff to plead or prove the negative of contributory negligence, would indicate that contributory negligence is the only defense to an action to recover damages for negligence which is not embraced within a denial drawn in conformity with the statute, but which must be affirmatively set up; for if it had been the legislative intent to require the affirmative pleading by the defendant of

assumption of risk, and the fellow servant doctrine, it may well be thought that the statute itself would have so required.

*Moreover, the fact of the clutch bolt having been loosened, and the failure of the hoistman to notice that fact, or to notice the rapid descent of the hoist, and his failure to properly apply the brake, were but transitory dangers to which the men on the bucket were subject by reason of carelessness of co-servants.*

It has been said that where the danger to which the plaintiff was exposed was merely a transitory one, existing only on the single occasion when the injury was sustained, and due to no fault of plan or construction or lack of repair, and to no permanent defect or want of safety in the defendant's works, or in the manner in which they had been ordinarily used, the injured employee can not recover.

*Meehan v. Spiers Mfg. Co.* (Mass. 1899), 52 N. E. 518.

And the same rule has been again stated in the following language, to-wit:

"The absolute obligation of an employer to see that due care is used to provide safe appliances for his workmen is not extended to all the passing risks which arise from short-lived causes."

*Whittaker vs. Bent*, (Mass.), 46 N. E. 121.

And to the same effect are:



*Haskell et al vs. Proszdziankowski* (Ind. 1908)  
83 N. E. 626.

*Eddleman vs. Pennsylvania Co.* (Penn. 1909), 72  
Atl. 557.

*Wickham v. Detroit United Ry.* (Mich. 1910), 125  
N. W. 22.

*E. Van Winkle G. & M. Co. v. Brooks*, (Okla.  
1911), 116 Pac. 908.

And unless it could be said that it was the duty of the defendant company to have its master mechanic present to inspect the hoist and make whatever adjustment might be necessary, each time the machine was used, it must be admitted in this case that the particular condition out of which this accident arose was but a transitory condition arising between the times when reasonable inspections were made.

In fact it is a rule of well nigh universal application that the proof of a defect in machinery, or its being out of repair must be brought home to the master, either by express notice or by its existence for such a length of time as will charge him with notice, before he can be held responsible.

Thus in *Pockrass v. Kaplan*, 139 N. Y. Supp. 398, where a statutory guard had been removed from a circular saw because its presence was impracticable for a particular kind of work, it was held that the master was entitled to a reasonable time in which to discover the absence of this guard by inspection, and cause it to



be replaced before he would be liable for injuries resulting from its absence.

To the same effect is *Schlappendorf v. Amer. R. T. Co.*, 141 N. Y. Supp. 486.

And in *Bradbury v. Kingston Coal Co.*, *supra.*, it is said:

“In the fourth place, the testimony develops at best simply a case of ordinary accident resulting from an unforeseen cause, not discoverable in advance of its occurrence, with no visible defect in any part of the machinery, and no knowledge of any defect on the part of the men who were constantly using the machinery, or of the company that employed them. The case comes clearly and distinctly within a number of our own decisions, and the general principle applicable to all is thoroughly expressed in one of the oldest of them. *Baker v. Railroad Co.*, 95 Pa. St. 211. Mr. Chief Justice Sharswood, speaking for the court, there said: “A servant assumes all the ordinary risks of his employment. He cannot hold the master responsible for an injury which cannot be traced directly to his negligence. If it has resulted from the negligence of a fellow servant in the same employment, he must look to him and not to the master, for redress. The master does not warrant him against such negligence. The duty which the master owes to his servants is to provide them with safe tools and machinery, where that is necessary. When he does this he does not,

however, engage that they will always continue in the same condition. Any defects which may become apparent in their use it is the duty of the servant to observe, and report to his employer. The servant has the means of discovering any such defects which the master does not possess. It is not negligence in the master if the tool or machine breaks, whether from an internal, original fault not apparent when the tool or machine was at first provided, or from an external apparent one, produced by time, and not brought to the master's knowledge. These are the ordinary risks of the employment which the servant takes upon himself. *Ryan v. Railroad Co.*, 23 Pa. St. 384." The present case is conspicuously within the operation of this ruling. The wire pin is conclusively shown to have been amply sufficient for its purpose, and free from original defect, by the fact that for seven years it continuously and successfully served its use without any change, repair, substitution, or visible defect. It gave no external indication of defect up to the moment of the accident, and there is no testimony that it had diminished in size, or changed in appearance or in substance; no crack or flaw was discovered, and on the actual testimony in the cause no defect was visible or known to the engineer, the mine inspector, or the defendant. The breaking of the wire pin, therefore, was apparently, or possibly, "produced by time and use," from a cause "not brought

to the master's knowledge." Under the foregoing decision, "these are the ordinary risks of the employment which the servant takes upon himself."

And to the same effect is:

*American Bridge Co. v. Seeds*, (C. C. A. 8th Cir.)  
144 Fed. 605, 609.

In fact it may be said as a general proposition that there is no negligence where there is no knowledge of the danger on the part of the master, and no knowledge of the defect in the instrumentality said to have caused the injury. A master who has furnished his servants with safe instrumentalities for the doing of their work, may rest upon the presumption that such instrumentalities will be safely and properly used.

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### *Contributory Negligence.*

The facts surrounding the accident to the deceased have been quite fully set forth, so that it is unnecessary at this point to enter into any lengthy discussion of the proposition that the deceased himself was guilty of contributory negligence. It was affirmatively shown that the deceased himself had operated this hoist; that its condition at the time of the accident was just the same as it had been for many months prior thereto,—even before it had been moved down to the new shaft. The deceased had, also, on other occasions aided in the operation of uncoiling and rewinding the cable, and knew that it was customary when doing so to loosen

the clutch bands in identically the same way as had been done by Jacobson's crew on the day of the accident. He had two sources of knowledge that the clutch bands had been loosened upon the particular night of the accident, viz., that the work of rewinding the cable was unfinished when he went to work, a fact sufficient in itself to warn the deceased of the loosened clutch bands, and was told by Lytton that the bands had been loosened. Whatever risk there was in descending upon the bucket was known to the deceased and in attempting to descend into the shaft without seeing that the hoist was in safe condition the deceased was guilty of contributory negligence. In this connection it must be remembered also that admittedly the hoist man, insofar as lowering and raising the bucket was concerned, took his orders from Witkouski; that a positive rule promulgated by the defendant required the bucket to make one complete trip before men were lowered or raised thereon. It is beyond dispute that the duty to see that this rule was obeyed was upon Witkouski. He, however, without requiring, or even permitting the hoistman to try out the machine, loaded the bucket and climbed upon it, followed by his men, without heed to the defendant's rule. In this, also, he was guilty of contributory negligence. And, finally, his death was due entirely to his own act in leaping from the bucket, rather than in staying on the same as the other men did, and in doing which he would have received no injury.

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Summarizing then the contentions of the Plaintiff

in Error in this case, we respectfully submit that the master had discharged its full duty towards the servant, and that clearly the only negligence which, in view of all of the evidence in the light most favorable to the plaintiffs, it could be said was proven, was the negligence of a fellow servant in relation to a mere detail of the work; that the proximate cause of the accident to the deceased was not embraced in any of the charges of negligence set up in the complaint; and that the deceased was himself guilty of contributory negligence.

Respectfully submitted,

JAMES A. WAYNE,  
Attorney for Plaintiff in Error.



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No. 2588

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United States  
**Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

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BERTHA D. WITKOUSKI, *et al.*,  
*Defendants in Error,*  
*vs.*

CONSOLIDATED INTERSTATE - CALLAHAN  
MINING COMPANY, a Corporation,  
*Plaintiff in Error.*

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BRIEF OF DEFENDANT IN ERROR.

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*Upon Writ of Error to the United States District  
Court, for the District of Idaho, Northern  
Division.*

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PLUMMER & LAVIN  
of Spokane, Wash.,  
and  
THERRETT TOWLES  
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*Attorneys for Defendants in Error.*

Filed

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F. D. Monahan,  
Clerk



No. ....

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## STATEMENT OF CASE.

This is an action to recover damages for wrongful death, instituted by defendant in error in her own behalf as widow, and as Guardian *ad Litem* for and on behalf of two minor, male children, aged five and eight years, for the death of the husband and father, while an employee of plaintiff in error, a mining company, which occurred near Wallace, Idaho, on May 18th, 1916. The cause came regularly on for trial, resulting in a verdict in favor of defendants in error, in the sum of \$15,000.00. Motion for new trial was seasonably made and overruled, and judgment was entered upon the verdict, from which judgment, so rendered, this appeal is prosecuted.

## THE FACTS.

Plaintiff in error, a mining corporation, owns and operates a certain zinc-lead producing mine in Shoshone County, Idaho, and at the time of the happening of the accident which resulted in the death of deceased, was engaged in the development of and extraction of ore from, such mine. Among other workings of the mine, there existed a certain vertical shaft, over 300 feet in depth, through which shaft men and materials were lowered and raised by means of a skip, cage, or bucket, oper-



ated by a compressed air hoist. One end of the cable which raised and lowered the skip was attached to a cross-arm, at the top of the skip, and the other end was attached to a revolving drum, fastened upon the shaft of the hoist; among other mechanical parts of the hoist was a clutch band, which was adjusted by means of a threaded nut or bolt, and the tension of the clutch band, which served as a brake, could be adjusted by loosening or tightening the nut or bolt, so as to retard and control the action of the skip or bucket. The miners worked eight-hour shifts, and on each shift the hoisting machinery was in charge of and operated by an employee known and designated as a hoistman. The hoistman was under the immediate supervision of the master mechanic, to whom he was required to report any defects in the hoist that might arise during its use and operation. It was the duty of the master mechanic to make daily inspections of the hoist, and to make such repairs as were necessary, and the rules of the plaintiff in error (Tr. 68), provide that it was the duty of the mechanical department to daily inspect the hoisting apparatus, and to see that the same was in a safe condition, and if the same appeared to be out of order, to make such repairs as were necessary before continuing hoisting operations.

The cable on the hoist being a new one, would frequently warp or kink on the drum. When this occurred it was necessary to unwind the cable, and rewind it upon the drum. In order to give the drum greater velocity, and permit it to unwind more freely, it was customary to loosen the clutch bolt, which relaxed the tension of the brake band. This bolt was loosened by the hoistman of the shift immediately preceding that upon which deceased was employed, and after the cable was unwound, the hoistman and crew began rewinding the cable, but did not tighten the clutch bolt. The hoist was turned over by the hoistman to the succeeding hoistman, Egbert, who was operating it at the time of the accident, and the preceding hoistman failed to inform Egbert of the loosening of the clutch bolt, or of the fact that it had not been retightened. The hoistman who loosened the clutch bolt testified that the shaft of the hoist, upon which the drum revolved was sprung, and that if this condition had not existed, it would not have been necessary to loosen the clutch bolt. (Tr. 122-159.)

The master mechanic testified for plaintiff in error, that it was necessary to loosen the clutch bolt before unwinding the cable, and that it was the duty of the hoistman to retighten the clutch

bolt before rewinding the cable. (We quote from the testimony of the master mechanic as follows (Tr. 236):

“Q. What is the custom, when cable is to be rewound upon the spool or drum, as to releasing the clutch?

\* \* \* \* \*

THE COURT: Get right at it. What is the custom?

A. Why release this clutch bolt and unwind the cable to the place where it is slack, and then rewind it so that it is even.

Q. And then after it is rewound the nut is tightened again?

A. The nut is tightened before you start to rewind.

Q. Do you know whose duty it was to loosen and tighten that nut when the cable was being rewound?

A. It was the hoistman's duty.”  
Again, on page 242 of the Transcript:

“Q. You would loosen the screw to unwind the cable?

A. Yes, sir.

Q. And then you would tighten it and then rewind the cable?

A. Tighten up the screw and pull up the clutch lever, you see; you see there is a lever that operates that clutch, and in order to change that cable you simply release that lever, undo the screw—

Q. If it had been handled properly, you

mean, by the preceding shift, that unwound the cable, they would have tightened the screw after they finished unwinding and before they began to rewind it? In other words, the shift before Mr. Witkouski's shift unwound or started to reverse this cable?

A. Yes, sir."

The defective condition of the hoist was reported to the master mechanic (Tr. 145), who, himself, had told the hoistman to loosen this clutch bolt (Tr. 142), and the testimony showed that if it was not so tightened, the hoistman was liable to lose control of the skip at any time (Tr. 146).

It was admitted that when the deceased's shift came on duty, the previous shift had rewound all but about 75 feet of the cable (Tr. 244). In order to accelerate the speed of the hoist, the hoistman had released the clutch band or brake, by loosening the clutch bolt, and when his shift had completed their day's work, he turned the hoist over to the next hoistman, Egbert, who operated the hoist on the shift on which deceased was working, but said hoistman on said previous shift said nothing to the hoistman on the succeeding shift, Egbert, of his failure to tighten the bolt, and therefore, the Court can readily see, as was observed by the trial judge in his opinion on the motion for

new trial (Supplemental Tr. 21), that even if Witkouski knew of the mechanical conditions of the hoist, and the necessity for loosening and tightening this bolt, he would have had a right to assume that the bolt had been tightened before he went on shift, because it was customary to tighten the bolt before the cable was rewound, and the rewinding had been almost completed by the previous shift.

The Court will notice on page 237 of the Transcript, the following testimony of witness Hughes, the company's master mechanic:

“Q. If there was any repairs to be made you made them?

A. Yes, sir.

Q. Did they ever notify you of any repairs which were needed which were not made?

A. They have not.

#### CROSS-EXAMINATION.

Q. You was at the head of that department (the mechanical department), I assume?

A. I was.

Q. And any repairs that was reported to you or that you knew of you would see that they were made?

A. I did.”



We now quote from the testimony of witness Egbert (Tr. 145):

“Q. State whether or not you ever advised the master mechanic with reference to the condition of this hoist, and the danger of operating it.

A. I did.

\* \* \* \* \*

Q. What did you say to him?

A. I pointed out the defects, those defects in the clutch to him.”

Rule 28 of the company, offered and received in evidence (Tr. 68), reads as follows:

“It shall be the duty of the mechanical department to daily inspect the hoisting ropes and engines to see that the same are in a safe condition and in proper repair, and if at any time the rope or any part of the machinery shall appear to be out of order, to have the same repaired before continuing with the hoisting.”

Deceased, with three other laborers, who were engaged in sinking the shaft, got upon the skip or bucket for the purpose of being lowered to the bottom of the shaft, where they were directed to work, and after being lowered a short distance, the hoistman lost control of the bucket, and it fell, and deceased becoming frightened and terror stricken, and believing that he would be killed if he remained upon the bucket, attempted to catch

hold of a cross-piece of timber in the shaft, and missing his hold, fell to the bottom of the shaft, and was instantly killed. The deceased knew nothing about the defective condition of the hoist. The hoistman operating the hoist at the time of the accident testified that he made every effort possible to stop the descent of the bucket after he discovered that he had lost control of it (Tr. 134). Deceased at the time of his death was 37 years of age, with a life expectancy of 30.35 years, and was earning from \$5.00 to \$7.00 per day.

### THE RECORD.

Plaintiff in error in its preparation of the Transcript of Record has failed to include the motion for new trial, which was served, filed and argued, and the opinion of the trial court and the order denying the motion. This was for the reason, no doubt, that the trial court recited in the opinion, matters and things that occurred at the trial which were not contained in the original Transcript of Record. To the end that this court may be fully informed, we have had prepared a Supplemental Transcript containing the motion for new trial (Sup. Ab. 7), and opinion of the trial court (Sup. Ab. 16), from which it will appear that the matters now assigned as error were not embraced in

the motion for a new trial, and such matters, under numerous rulings, should not be considered by this court.

## THEORY OF PLAINTIFF IN ERROR AT TIME OF TRIAL.

It was conceded at the time of trial, as will be found from the opening statement of counsel for plaintiff in error, that the rapid descent of the skip or bucket was due wholly to the defective condition of the hoist, due to the act of the preceding hoistman in loosening the nut or clutch bolt (Tr. 177).

The plaintiff in error, pleaded certain defenses in the answer (20-30-31), but nowhere in the answer did it allege that the accident was the result of negligence of the operating hoistman, in actual operation of the hoist, and that he, being a fellow servant, defendants in error could not recover. No instruction defining such theory was requested, nor were the instructions given excepted to.

## ARGUMENT.

Before proceeding to a discussion of this case, we respectfully direct your Honors' attention to the assignments of error (Tr. 280), and especially to assignments 3, 4, 5 and 6 (Tr. 285-289).

Assignment 1 (Tr. 269), deals with the question of fellow servant as applied to the mechanical and operating departments, and while no complaint is made with reference to the matters contained in the instruction, complaint is made because the instruction fails to include the further consideration that if the entire crew were at the time engaged in the common employment of re-winding the cable, then they had all become for that time, fellow servants, employed in the mechanical department. Assuming, for the purpose of argument only, that this is true, suffice to suggest that the accident did not occur while the cable was being rewound, but occurred while deceased was upon the skip or bucket, and was being lowered into the shaft, and he was then engaged as an operative, and at that time was not engaged in the mechanical department, if, in fact, he ever was engaged in that department, which we do not admit.

Subdivision 2 (Tr. 269), questions the validity of another instruction. A reading of the record at this point will show that the trial court, acceding to counsel's suggestion that the instruction might mislead, recalled the jury and explained that an inaccuracy had occurred, and changed the instruction complained of, and to the instruction so given,

no exception was taken (Tr. 274).

The Court will observe, by examining the assignments of error now made, that plaintiff in error has waived any error that might have occurred, so far as the instructions are concerned, by failing to properly preserve exceptions, and plaintiff in error should not be allowed to incorporate assignments of error for the first time in the Transcript of Record, nor to present its case upon a theory different from that upon which it was tried. This court has heretofore held that exceptions to instructions given, in order to be considered by an appellate court, must be taken at the trial, and while the jury is at the bar, and such fact must affirmatively appear.

See:

*Alverson vs. Oregon-Washington R. & Nav. Co.*, 236 Fed. 331.

Counsel will no doubt contend that the hoistman and deceased were fellow servants. Plaintiff in error, as already pointed out, admitted that the sole cause of the accident was the act of the preceding hoistman in loosening the nut or bolt on the clutch (Tr. 177). It will not be questioned that the loosening of the clutch bolt or the failure



to tighten it before using the hoist was the negligence of someone, and the only controlling question if not substantially the only question involved, had exceptions been properly preserved, would be, was the plaintiff in error responsible therefor?

This question of fact was submitted to the jury under instructions of which no complaint is made. The instructions expressly told the jury that even though it found that the defendant was chargeable with negligence relative to the loose screw, still if Witkouski, the deceased, had knowledge of its defective condition, and notwithstanding such knowledge attempted to use the hoist, defendants in error could not recover. There was no proof that deceased had such knowledge.

We anticipate that it may be contended that the accident was due to the careless operation of the hoist by Egbert, the hoistman, who went on duty at the same time as deceased, but the plaintiff in error did not try the case upon such theory. It pleaded certain affirmative defenses, but nowhere did it allege that the accident was due to the negligence of Egbert, and that he, being a fellow servant of deceased, defendants in error could not recover. No instruction was requested defining such theory, and the instructions given were not ex-

cepted to in that respect. The plaintiff in error conceded that the accident was due solely to the fact that the clutch did not properly function, and surely if plaintiff in error had been contending, as it will no doubt now, for the first time contend, that the carelessness of the hoistman was the proximate cause of the death of deceased, proper exceptions would have been taken to the instructions. Furthermore, the hoistman testified that he did everything he possibly could do to stop the rapid descent of the skip after he discovered he had lost control of it (Tr. 134).

Summing up, and in the light of the facts most favorable to plaintiff in error, in this case, the plaintiff in error, acting in the person of the hoistman, loosened the clutch bolt, and then negligently failed to tighten it before attempting to lower the deceased to the working place. The mechanical department performed the non-delegable duties of the plaintiff in error in keeping the hoist in proper condition of repair. Upon this phase plaintiff in error will no doubt cite the case of *Quebec S. S. Co. vs. Merchant*, 133 U. S. 375. The apparent relevancy of the case lies only in the fact that the servant who was negligent was called a "carpenter," but the duty he negligently performed was

not that of carpenter at all, but of an attendant or porter. He was an operative only, and was not repairing or inspecting the ship. In no sense was he a vice-principal. It is elementary that it is not what an employee is called, but the nature of his service that fixes his status.

The instruction given which is now complained of in the transcript, but to which no exception was taken or preserved, is as follows:

“If you find from the evidence that the witness Lytton, who was the hoistman upon the shift immediately preceding Egbert, and Egbert were under the direction and exclusive command and authority of the master mechanic or general foreman, or both, and that the deceased, and other pushers, as they are called, that is, occupying the same position that he did, with other shifts or crews, and you further find that Witkouski, the deceased, and other pushers, had no authority over or right to give orders to or direct said hoistmen as to matters and things incident to or pertaining to keeping said hoist in a reasonably safe condition of repair and efficiency, and that said Lytton, when he went off shift, left the same in an unsafe condition of repair and efficiency, without notifying the succeeding engineer, Egbert, of such condition, and that such conduct on his part was negligence contributing to or causing the injury, and his act in so leaving the screw and failing to notify Egbert constituted the proximate cause or contributed to the death of the deceased, then you should find

for the plaintiffs, unless you further find that Witkouski knew or had reason to believe in the existence of the mechanical conditions which did exist, and which constituted the defective conditions of the hoist, and was further able to appreciate the risk incident to such condition, and notwithstanding such knowledge or information, and such ability to appreciate the risk, attempted to ride down upon the bucket, when the hoist was in such defective condition."

This instruction, to which no exception was taken, as required by the rule and by the decisions of this and other courts, is more favorable to plaintiff in error than need be, and the Court would have been justified, in view of the evidence, and the theory of plaintiff in error, taken in connection with the opening statement, and the admissions therein contained, in directing a verdict in favor of defendant in error. Your Honors can search the record and you will not find the charge excepted to in any manner, and therefore the error now claimed is not available in this court.

These suggestions should make it unnecessary to discuss this case further, but in order to illustrate the erroneous contention of plaintiff in error, that the deceased and the hoistman were fellow servants, we direct your Honors' attention to the following facts. The deceased was killed while he was



upon the skip or bucket, being lowered to the working place. The proximate cause of his death was the defective condition of the hoist. It is admitted that the hoist and the hoistman were a part of the mechanical department. Deceased had nothing whatever to do with the hoist or hoisting apparatus. The master mechanic, who had charge of the mechanical department, testified that it was the duty of the hoistman to tighten the clutch bolt not only before proceeding to lower the men but before rewinding the cable. He failed to perform this duty. In the light of these admitted facts, it would be carrying the doctrine of fellow servant too far to hold the hoistman and the deceased fellow servants.

See:

*Baltimore & Ohio R. Co. vs. Baugh*, 37 Law Ed. 772.

*McCabe & Steen Co. vs. Wilson*, 52 Law Ed. 788, 2d Case, 792.

In the *Baugh* case, *supra*, the Court say:

“So, oftentimes there is in the affairs of such corporations, what may be called a manufacturing or repair department, and another strictly operating department; these two departments are in their relations to each other.



as distinct and separate as though the work of each was carried on by a separate corporation, and from this natural separation flows the rule that he who is placed in charge of such separate branch of the service, who alone superintends and has control of it, is as to it in the place of the master."

And in the Wilson case, *supra*, it is said:

"There remain for consideration these matters: One, the contention that the plaintiff was a fellow servant with the foreman of the gang at work on the bridge and the superintendent of construction; another, the question of negligence on the part of the defendant; and a third, contributory negligence. With reference to the first, it must be borne in mind that the plaintiff was a fireman employed on a locomotive, and his work was in a separate department from that of the employees engaged in the construction of the bridge. This is not a case for the application of the doctrine of fellow servant. It would be carrying that doctrine too far to hold that one employed as a fireman and engaged in the movement of a train was a fellow servant with the superintendent of construction and the foreman of a bridge gang, both of whom were present and engaged in supervising and directing the work on the bridge. These latter employees represented the principal in an entirely different line of employment from that in which plaintiff was engaged, were discharging a positive duty of the master to provide a safe and suitable place and structures in and upon which its employes were to do their work,—Union P. R. Co. v. O'Brien, 161 U. S. 451, 40 Law Ed. 766, 16 Sup. Ct. Rep. 618, and cases cited

in the opinion,—and, in discharging that positive duty, they, and not he, were the representatives of the defendant. Their action, so far as that work was concerned, was the action of the defendant.”

See also, *Christianelli vs. Saginaw Mining Co.* (Michigan), 117 N. W. 910, holding that the engineer of a hoist, in so far as the performance of his duty to keep the place safe was concerned, was not a fellow servant of an employee engaged in loading machinery onto the hoist.

See also, *Swift vs. Short*, 92 Fed. 567 (8th Circuit), where the Court in dealing with an action brought to recover damages for injuries sustained by a servant through the defective wiring of a clutch, where contention was made that the servant injured was a fellow servant of the machinist who repaired the clutch, said:

“It is furthermore insisted in the brief that, in any event, the plaintiff should not have recovered, because the defective wiring of the shoe, if not done by the plaintiff himself, was at least done by his fellow servants, and that the defendant cannot be held responsible to the plaintiff for their negligence. The conclusive answer to this question is that, if the wiring was done by other persons in the employ of defendant, and was neither done by the plaintiff nor under his supervision, then, in the matter of making such repairs, such other servants were performing a personal

duty which the master owed to the plaintiff, and the rule of respondeat superior applies. *Balch v. Haas*, 36 U. S. App. 698, 701, 20 C. C. A. 151, and 73 Fed. 974; *Minneapolis v. Lundin*, 19 U. S. App. 247, 249, 7 C. C. A. 344, and 58 Fed. 525; *Railroad Co. v. Keegan*, 160 U. S. 259, 264, 16 Sup. Ct. 269."

See also, *Northern Pacific Ry. Co. vs. Herbert*, 29 Law Ed. 755, at p. 760, the Supreme Court of the United States, quoting approvingly from *Shanny vs. Androscoggin Mills (Maine)*, says:

"On the trial the defendants contend among other things, that if the defective covering was owing to the negligence of a fellow servant, whose duty it was to repair it, they were not liable. But the Court said that the person whose duty it was to keep the machinery in order, so far as that duty goes, was not, in any legal sense, a fellow servant of the plaintiff. To provide machinery and keep it in repair, and to use it for the purpose for which it was intended, are very distinct matters. They are not employments in the same common business, tending to the same common result."

And again, at p. 760, the Court say:

"If, however, he was appointed (to look after machinery and appliances and keep them in repair), charged with that duty, and the injuries resulted from his negligence in its performance, the company is liable."

And in the same case, Mr. Justice Harlan, in a concurring opinion at page 762, said:

“Between an agent, charged with the performance of the company’s duty to provide and maintain safe and suitable appliances and machinery, and the employees who use them, the relation of fellow servant does not exist.”

And in the same case, at page 759, the Court say:

“The business of providing safe machinery and keeping it in repair is distinct from the business of handling and moving it, and these are separate and independent departments of service, *though the same person may by turns render service in each*, and the person engaged in the former represents the employer, and in that business is not the fellow servant with one engaged in the latter.”

See also:

*Regan vs. Parker-Washington Co.* (C. C. A., 7th Circuit), 205 Federal, 692.

*Houston vs. Brush* (Vt.), 29 Atl. 380-383.

*Higgins vs. Williams* (Cal.), 45 Pac. 1041.

*Steel vs. Grant* (N. C.), 82 S. E. 1038.

*Maki vs. Isle Royal Copper Co.* (Mich.), 147 N. W. 533.

*Rincicotti vs. John J. O’Brien Cont. Co.* (Conn.), 60 Atl. 115.

*Zellars vs. Missouri Water & Light Co.* (Mo.), 92 Mo. Appeals, 107.



See also, *Hough vs. Texas & Pac. Ry. Co.*, 25 Law Ed. 612, opinion by Mr. Justice Harlan, the Court say:

“The rule of law which exempted the master from responsibility to the servant for injuries received from the ordinary risks of his employment, including the negligence of his fellow servants, does not excuse the ordinary care in supplying and maintaining proper instrumentalities for the performance of the work required. One who enters the employment of another has a right to count on this duty, and is not required to assume the risks of the master’s negligence in this respect. The fact that it is a duty which must always be discharged, where the employer is a corporation, by officers and agents, does not relieve the corporation from that obligation. The agents who are charged with the duty of supplying safe machinery, are not in the true sense of the rule relied on, to be regarded as fellow servants of those who are engaged in operating it. They are charged with the master’s duty to his servant. They are employed in distinct and independent departments of service, and there is no difficulty in distinguishing them, even when the servant renders service by turns in each, as the convenience of the employer may require. \* \* \* “The corporation is equally chargeable, whether the negligence was in originally failing to provide or in afterwards failing to keep its machinery in safe condition.”

See also:

*Union Pac. Ry. Co. vs. Snyder*, 38 Law Ed 597-601.



We ask in all sincerity, can there be any question of fellow servant involved in this case? There being "departments of service" can there be any doubt that the condition of the hoist was due to the negligence of the mechanical department, of which Mr. Hughes was the head, as master mechanic, and the hoist was operated in its defective condition, under his direction, and with his personal knowledge?

A vast number of cases might be collected, announcing the same principles of law, but it would avail no good purpose to extend this brief. The facts are not in dispute; there can be no logical presentation of the law as applicable to the contention of plaintiff in error, and we therefore respectfully urge that the verdict and judgment should be affirmed.

Respectfully submitted,

PLUMMER & LAVIN,

Spokane, Washington,

THERRETT TOWLES,

Wallace, Idaho,

*Attorneys for Defendants in Error.*

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

\_\_\_\_\_

EVA MAY GILL,

Appellant,

VS.

FILLMORE WHITE,

Appellee.

\_\_\_\_\_

Transcript of Record.

\_\_\_\_\_

Upon Appeal from the Southern Division of the  
United States District Court for the  
Northern District of California,  
First Division.

\_\_\_\_\_

FILED  
NOV 8 - 1917  
F. D. MUNOKTON,  
CLERK.



**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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EVA MAY GILL,

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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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## **Names and Addresses of Attorneys of Record.**

For Eva May Gill, a Creditor, Appellant:

ROBERT H. COUNTRYMAN, Esq., San Francisco, California.

For the Bankrupt and Appellee:

REUBEN G. HUNT, Esq., San Francisco, California.

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*In the District Court of the United States, Northern  
District of California, First Division.*

No. 9737.—IN BANKRUPTCY.

In the Matter of FILLMORE WHITE,

Bankrupt.

### **Praeipice for Transcript on Appeal.**

To the Clerk of the Above-named Court:

Please make up, print and issue in the above-entitled cause a certified transcript of the record upon appeal allowed in this cause to the Circuit Court of Appeals of the United States for the Ninth Circuit, sitting at San Francisco, California, the said transcript to include the following:

1. Petition of Fillmore White for a discharge;
2. Specification of grounds on opposition to bankrupt's discharge;
3. Report of referee on opposition to discharge;
4. Exceptions to report of referee in opposition to discharge;
5. Order of the above-entitled court overruling the exceptions to the report of the referee in opposition to discharge and confirming said report of said

referee and granting a discharge to said Fillmore White, bankrupt;

6. Petition for order allowing appeal and order allowing appeal;

7. Assignment of errors;

8. Bond on appeal;

9. Citation on appeal;

10. Praeceptum for transcript on appeal. [1\*]

You will please transfer to the Circuit Court of Appeals with the record to be prepared as above the original Citation on appeal.

R. H. COUNTRYMAN,

Attorney for Appellant.

[Endorsed]: Filed Apr. 3, 1917, at 3 o'clock and 45 min. P. M. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [2]

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*In the District Court of the United States, Northern  
District of California, First Division.*

No. 9737.—IN BANKRUPTCY.

In the Matter of FILLMORE WHITE,

A Bankrupt.

**Affidavit of Service of Praeceptum for Transcript of  
Record.**

United States of America,

State of California,

City and County of San Francisco,—ss.

On this 3d day of April, 1917, personally appeared before me, George H. Cavalier, the subscriber and

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\*Page-number appearing at foot of page of original certified Transcript of Record.

makes oath that he delivered a true copy of the Praeceptum filed herein on the 3d day of April, 1917, to R. G. Hunt, by delivering to and leaving with his stenographer at the law office of said R. G. Hunt, Flatiron Building, San Francisco, said copy.

GEORGE H. CAVALIER.

Subscribed and sworn to before me this 3d day of April, 1917.

[Seal]

HENRIETTA HARPER,

Notary Public in and for said City and County of San Francisco.

[Endorsed]: Filed Apr. 10, 1917, at 3 o'clock and — min. P. M. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk. [3]

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*In the District Court of the United States, Northern District of California.*

No. 9737.—IN BANKRUPTCY.

In the Matter of FILLMORE WHITE,  
Bankrupt.

**(Petition for Discharge.)**

To the Honorable M. T. DOOLING, Judge of the District Court of the Northern District of California:

———— of ———, the City and County of San Francisco and State of California, in said District, respectively represents that on the 17th day of November A. D. 1915 last past, he was duly adjudged bankrupt under the Acts of Congress relating to bankruptcy; that he has duly surrendered all



his property and rights of property, and has fully complied with the requirements of said acts and of the orders of the Court touching his bankruptcy.

Wherefore he prays that he may be decreed by the Court to have a full discharge from all debts provable against his estate under said bankrupt acts, except such debts as are exempted by law from such discharge.

Dated this 11th day of February, A. D., 1916.

FILLMORE WHITE,  
Bankrupt. [4]

State of California,  
City and County of San Francisco.

Fillmore White, being sworn, says: That he has applied to the District Court for the Northern district of California for discharge from his debts under the provisions of the acts of Congress relating to bankruptcy; that he has not done, suffered, or been privy to any act, matter or thing specified in said acts as ground for withholding or refusing such discharge, and that he has not suffered or been privy to any act, matter or thing which it specified as an objection to his discharge would cause such discharge to be refused by said Court.

FILLMORE WHITE,  
Bankrupt.

Subscribed and sworn to before me, this 11th day of February, A. D. 1916.

[Seal] JOHN E. MANDERS,  
Notary Public in and for the City and County of  
San Francisco, State of California.

[Endorsed]: Filed Feb. 14, 1916, at 11 o'clock and 30 min. A. M. A. B. Kreft, Referee in Bankruptcy.

Filed Mar. 10, 1916, at 9 o'clock and 30 min. A. M. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk. [5]

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*In the District Court of the United States, in and for  
the Northern District of California, First Di-  
vision.*

No. 9737.

In the Matter of FILLMORE WHITE,

Bankrupt.

**Specification of Grounds of Opposition to  
Bankrupt's Discharge.**

Eva May Gill, of Sparks, State of Nevada, a party interested in the estate of said Fillmore White, Bankrupt, does hereby oppose the granting to him of a discharge from his debts, and, particularly, the debt to her, and for the grounds of such opposition does file the following specifications, viz.:

That said Eva May Gill is informed and believes, and upon such information and belief alleges:

That said bankrupt, Fillmore White, with the intent to conceal his financial condition, has destroyed, concealed and failed to keep books of account from which his financial condition might be ascertained, knowingly and with fraudulent intent so as to prevent said creditors from inquiring into the financial condition of said bankrupt.

That said Eva May Gill is further informed and believes, and on such information and belief, alleges:

That within the period of four (4) months immediately preceding the filing of the petition in bankruptcy by said bankrupt, Fillmore White, said bankrupt transferred, removed, destroyed, concealed and permitted to be removed, destroyed and concealed, certain property belonging to said bankrupt [6] with the intent to hinder, delay and defraud his said creditors and particularly, said Eva May Gill.

That said creditor, Eva May Gill, further opposes the granting to said bankrupt a discharge from his debts on the following grounds, viz.:

That said bankrupt has been guilty of fraud upon said Eva May Gill, and has made false and fraudulent representations to said Eva May Gill, that is to say, as follows, to wit:

That on the 20th day of March, 1912, Charles S. Laumeister, Peter P. Flood and Marshall W. Giselman made, executed and delivered to the husband of said creditor, Eva May Gill, a promissory note for the sum of Twenty-five Hundred (\$2,500) Dollars, payable six (6) months after date. That said note was given by said makers as the purchase price of certain shares of stock in the Reno Ruhl Gold Mining Company, a Nevada corporation, which, prior to the 20th day of March, 1912, were owned and held by said W. J. Gill, the husband of said Eva May Gill. That on or about the 20th day of July, 1912, said bankrupt, Fillmore White, purchased from said Flood and Laumeister certain shares of stock owned and held by said Flood and Laumeister in the Reno Ruhl Gold Mining Company, and as a part consideration of said sale said bankrupt assumed

and agreed to pay the said note so executed to said W. J. Gill.

That on the 20th day of September, 1915, the day upon which the note executed by said Laumeister and Flood and Giselman fell due, said bankrupt induced said W. J. Gill to surrender up the said note of March 20th, 1912, to said [7] bankrupt, and in lieu thereof to accept a joint and several note made and executed by said bankrupt and said Marshall W. Giselman, and endorsed by said Flood and Laumeister, and payable six (6) months after date.

That on or about the 13th day of November, 1912, said W. J. Gill, in writing, endorsed and delivered said note of September 20th, 1912, to said Eva May Gill. That said W. J. Gill died on November 13th, 1912. That a short time before said note of September 20th, 1912, fell due said bankrupt persuaded said Eva May Gill, not to presently prosecute or take any proceedings towards the collection of said note and requested an extension of time for the payment thereof. That said Eva May Gill complied with the request of said bankrupt for an extension of the payment of said note of September 20th, 1912. That said Eva May Gill was ignorant of the law providing that an extension of time granted to the makers of said note of September 20th, 1912, would legally prevent her from obtaining payment from the endorsers thereof. That each of said endorsers was and is financially able to pay the sum of money evidenced to be paid by said note.

That the purpose and object of said bankrupt in



applying for said extension of time was for the fraudulent purpose and object of relieving said endorsers from any liability on said note, and exonerating them from the payment of the same, thereby cancelling the indebtedness of said bankrupt to said Laumeister and Flood and preventing said Eva May Gill from obtaining said money from said Laumeister and Flood.

That after said endorsers on said note of September 20th, 1912, were relieved from said obligation to said [8] Eva May Gill, said bankrupt failed, neglected and refused to pay said note of September 20th, 1912, or any part or portion thereof, claiming said *said* W. J. Gill, deceased, had made false and fraudulent representations to said bankrupt as to the value per ton of the ore that was taken from said mine and as to the paying character of said mine in general.

That said Eva May Gill was compelled to bring suit in the Superior Court of the State of California, in and for the City and County of San Francisco, No. 55,135 on the register of said Superior Court, against said bankrupt, Fillmore White, for the collection of said note.

That on the 23d day of December, 1914, said Superior Court, rendered judgment in favor of said Eva May Gill and against said bankrupt for the amount due on said promissory note of September 20th, 1912 with interest and costs of suit. That judgment thereon was entered on the 4th day of January, 1915. Said judgment is final and unsatisfied in whole or in part.

That said bankrupt by fraudulently procuring said



extension of time and thereby relieving the endorsers on said note of September 20th, 1912, prevented said Eva May Gill from legally proceeding against said endorsers who were, and now are, and each of them is, responsible and solvent, and were and are able to pay said note, and the whole amount of principal and interest thereof.

That on account of said fraud, and for the other reasons above set forth in this opposition to the discharge of said bankrupt, this creditor prays that said application for a discharge by said bankrupt be denied.

EVA MAY GILL,  
Creditor.

By R. H. COUNTRYMAN,  
Her Attorney. [9]

State of California,  
City and County of San Francisco,—ss.

R. H. Countryman, being duly sworn, says: That he is the attorney for said Eva May Gill and represents said creditor in said bankruptcy proceedings; that he has read the above and foregoing opposition to discharge and well knows the contents thereof, that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

That this affidavit is made by this affiant because of the absence of said Eva May Gill from the State of California.

That this affiant resides in said City and County of San Francisco, and has his office therein.

R. H. COUNTRYMAN,

Subscribed and sworn to before me this 18th day of March, 1916.

[Seal]

HENRIETTA HARPER,

Notary Public in and for said City and County of San Francisco.

[Endorsed]: Filed Mar. 18, 1916, at 10 o'clock and — min. A. M. W. B. Maling, Clerk. By Lyle S. Morris, Deputy, Deputy Clerk. [10]

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*In the District Court of the United States, for the Southern Division of the Northern District of California, First Division.*

No. 9737.—IN BANKRUPTCY.

In the Matter of FILLMORE WHITE,

Bankrupt.

**Report of Referee on Opposition to Discharge.**

To Hon. MAURICE T. DOOLING, Judge of the United States District Court, for the Southern Division of the Northern District of California, First Division:

The undersigned referee, to whom as Special Master was referred the opposition of Eva May Gill, a creditor, to the discharge of the above-named bankrupt to ascertain and report the facts and his conclusions thereon, respectfully certifies and reports:

That upon the hearing Robert H. Countryman, Esq., appeared as counsel for the said opposing credi-

tor, and Reuben G. Hunt, Esq., appeared as counsel for the bankrupt. The testimony on the hearing was not reported. There are three specifications set forth in the opposition to discharge.

The first specification is as follows:

“That said bankrupt, Fillmore White, with the intent to conceal his financial condition, has destroyed, concealed and failed to keep books of account from which his financial condition might be ascertained, knowingly and with fraudulent intent so as to prevent said creditors from inquiring into the financial condition of said bankrupt.”

The bankrupt is a dentist. At the time of the filing of the petition in bankruptcy, he was engaged in the practice of his profession in San Francisco, but had been conducting his office only a short time prior to the filing of such petition. During the time he was practicing his profession, he has kept a financial record of his business through a “card system.” Prior to [11] opening his dental office, the bankrupt had been for several years Secretary of the Robert White Company, a corporation, engaged in the administration of the assets of the estate of Robert White, deceased, the father of the bankrupt. The transactions of this company, and the transactions of the bankrupt with the company, appeared upon the books of the corporation. I find that this first specification has not been proven. The evidence fails to show that there was any intent, or attempt on the part of the bankrupt to conceal his financial condition.

The second specification is as follows:

“That within the period of four (4) months immediately preceding the filing of the Petition in Bankruptcy by said bankrupt, Fillmore White, said bankrupt transferred, removed, destroyed, concealed and permitted to be removed, destroyed and concealed, certain property belonging to said bankrupt with the intent to hinder, delay and defraud his said creditors and particularly, said Eva May Gill.”

This specification is defective, in that it does not set forth the facts concerning the alleged fraudulent transfer. The referee, however, took evidence concerning certain acts of the bankrupt which, it was claimed, supported this specification. The facts are briefly, as follows:

On November 20th, 1912, the bankrupt was the owner of 125 shares of the capital stock of the said Robert White Company, and on that day transferred these shares on the books of the corporation, to his wife, Helen B. White. On August 4th, 1914, the bankrupt and his said wife executed and delivered to his mother, Emilie White, their joint promissory note for \$10,136.15 to cover advances previously made by the mother to the son. On May 7th, 1915, the mother commenced against the bankrupt and his wife, an action in the Superior Court of the State of California, in and for the City and County of San Francisco, to recover the principal of said promissory note [12] and the interest thereon, and in said action attached the said shares of stock which stood on the books of the corporation in the name of the wife. Judgment



was obtained in the said action for a full amount, and on June 21st, 1915, it was agreed between the plaintiff and the defendants, that the wife would transfer the stock to the mother if the mother would satisfy the judgment and pay the wife \$1500, it being agreed that the fair market value of the stock was \$1500 plus the amount of the judgment. This transaction was completed on July 2d, 1915, when the wife received the \$1500 and the stock was transferred to the mother on the books of the corporation, and the judgment satisfied of record. The petition in bankruptcy was filed herein on the 17th day of November, 1915, more than four months after the consummation of the said transfer. The facts as to the transfer are not in dispute. It appearing, however, that the transfer of the bankrupt's interest in the Robert White Company was made more than four months prior to the filing of the petition in bankruptcy, even though such transfer was made with the intent alleged in the specification, said transfer does not constitute a ground of opposition to discharge (see section 14, subdivision 4, of the Bankruptcy Act).

The third specification is as follows:

“That said bankrupt has been guilty of fraud upon said Eva May Gill, and has made false and fraudulent representations to said Eva May Gill, that is to say, as follows, to wit:

“That on the 20th day of March, 1912, Charles S. Laumeister, Peter P. Flood and Marshall W. Giselman made, executed and delivered to the husband of said creditor, Eva May Gill, a promissory note for the sum of Twenty-five Hundred



(\$2,500) Dollars, payable six (6) months after date. That said note was given by said makers as the purchase price of certain shares of stock in the Reno Ruhl Gold Mining Company, a Nevada corporation, which, prior to the 20th day of March, 1912, was owned and held by said W. J. Gill, the husband of said Eva May Gill. That on or about the 20th day of July, 1912, said bankrupt, [13] Fillmore White, purchased from said Flood and Laumeister certain shares of stock owned and held by said Flood and Laumeister in the Reno Ruhl Gold Mining Company, and as a part consideration of said sale said bankrupt assumed and agreed to pay the said note so executed to said W. J. Gill.

“That on the 20th day of September, 1915, the day upon which the note executed by said Laumeister and Flood and Giselman fell due, said bankrupt induced said W. J. Gill to surrender up the said note of March 20th, 1912, to said bankrupt, and in lieu thereof to accept a joint and several note made and executed by said bankrupt and said Marshall W. Giselman, and endorsed by said Flood and Laumeister, and payable six (6) months after date.

“That on or about the 13th day of November, 1912, said W. J. Gill, in writing, endorsed and delivered said note of September 20th, 1912, to said Eva May Gill. That said W. J. Gill died on November 13th, 1912. That a short time before said note of September 20th, 1912, fell due said bankrupt persuaded said Eva May Gill, not

to presently prosecute or take any proceedings towards the collection of said note and requested an extension of time for the payment thereof. That said Eva May Gill complied with the request of said bankrupt for an extension of the payment of said note of September 20th, 1912. That said Eva May Gill was ignorant of the law providing that an extension of time granted to the makers of said note of September 20th, 1912, would legally prevent her from obtaining payment from the endorsers thereof. That each of said endorsers was and is financially able to pay the sum of money evidenced to be paid by said note.

“That the purpose and object of said bankrupt in applying for said extension of time was for the fraudulent purpose and object of relieving said endorsers from any liability on said note, and exonerating them from the payment of the same, thereby cancelling the indebtedness of said bankrupt to said Laumeister and Flood and preventing said Eva May Gill from obtaining said money from said Laumeister and Flood.

“That after said endorsers on said note of September 20th, 1912, were relieved from said obligation to said Eva May Gill, said bankrupt failed, neglected and refused to pay said note of September 20th, 1912, or any part or portion thereof, claiming that said W. J. Gill, deceased, had made false and fraudulent representations to said bankrupt as to the value per ton of the

ore that was taken from said mine and as to the paying character of said mine in general.

“That said Eva May Gill was compelled to bring suit in the Superior Court of the State of California, in and for the City and County of San Francisco, No. 55,135 on the register of said Superior Court, against said bankrupt, Fillmore White, for the collection of said note.

“That on the 23d day of December, 1914, said Superior Court, rendered judgment in favor of said [14] Eva May Gill and against said bankrupt for the amount due on said promissory note of September 20th, 1912, with interest and costs of suit. That judgment thereon was entered on the 4th day of January, 1915. Said judgment is final and unsatisfied in whole or in part.

“That said bankrupt by fraudulently procuring said extension of time and thereby relieving the endorsers on said note of September 20th, 1912, prevented said Eva May Gill from legally proceeding against said endorsers who were, and now are, and each of them is, responsible and solvent, and were and are able to pay said note, and the whole amount of principal and interest thereof.”

This specification amounts to the charge that the bankrupt has been guilty of fraud upon Eva May Gill, and has made false and fraudulent representations to said Eva May Gill. The referee held that the facts charged in this third specification, even though true, do not constitute a ground of opposition

to discharge (see Section 14 of the Bankruptcy Act). The facts alleged concern only the dischargability of the claim of Eva May Gill, and do not affect the bankrupt's right to a general discharge. Section 17, subdivision 4 of the Bankrupt Act, provides:

“A discharge in bankruptcy shall release a bankrupt from all his provable debts, except such as were created by his fraud. . . .”

One question of law arose during the hearing, which the referee was requested, by counsel for the opposing creditor, to state to the Court. The opposing creditor called the bankrupt's wife as a witness. The bankrupt, through his counsel, refused to consent to the examination of the wife against him, and counsel for the bankrupt cited in support of his objection, the following cases:

In re Kessler, 35 Am. B. R. 30;

In re Hoffman, 28 Am. B. R. 680; 199 Fed. 448;

In re Thompson, 28 Am. B. R. 794; 197 Fed. 681.

In the case of *In re Kessler*, the United States District Court, for the Eastern District of Pennsylvania, speaking through [15] Thompson, District Judge, held that section 21a of the Bankruptcy Act permitting the wife of the bankrupt to be examined was qualified by Section 858 of the Revised Statutes of the United States as amended by act of June 29th, 1906, so that the competency of a witness to testify in a bankruptcy proceeding is to be determined by the laws of the state or territory in which court is held. Section 1881 of the Code of Civil Procedure of California, subdivision 1, provides as follows:



“A husband cannot be examined for or against his wife without her consent; nor a wife for or against her husband, without his consent; nor can either, during the marriage or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceedings for a crime committed by one against the other; or in an action brought by husband or wife against another person for the alienation of the affections of either husband or wife or in an action for damages against another person for adultery committed by either husband or wife.”

The referee sustained the objection, and the wife was not required to testify.

No one of the specifications of opposition to discharge having been proved, or established, I recommend that the bankrupt's discharge be granted as prayed.

Counsel for the opposing creditor desired to submit a brief, and the matter was ordered submitted on briefs 10x10 and 5 on November 29th, 1916. Counsel for the bankrupt consented to a continuance for the filing of the opposing creditor's brief until January 17th, 1917. No application has been made to me for an extension. Upon application by counsel for the bankrupt, the matter is now certified, no brief having been filed.



Dated January 20th, 1917.

Respectfully submitted,

ARMAND B. KREFT,

Special Master. [16]

There are no costs nor expenses upon the hearing.

The following papers are transmitted herewith:

Demurrer to specifications of grounds of opposition to bankrupt's discharge.

Citation of authorities upon examination of bankrupt's wife.

Memorandum as to the extent to which the wife of a bankrupt may be examined.

A. B. KREFT,

Special Master.

[Endorsed]: Filed Jan. 22, 1917, at 2 o'clock and 40 min. P. M. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk. [17]

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*In the District Court of the United States for the  
Southern Division of the Northern District of  
California, First Division.*

No. 9737—IN BANKRUPTCY.

In the Matter of FILLMORE WHITE.

Bankrupt.

**Exceptions to Report of Referee in Opposition to  
Discharge.**

Now comes Eva May Gill of Sparks, Nevada, a party interested in the Matter of Fillmore White, bankrupt, as a creditor of said Fillmore White, bankrupt, and makes and files the following exceptions to the report of the referee in bankruptcy.

1. Said Eva May Gill excepts to the statement appearing on page 2, of said Report to the effect that said Eva May Gill has not proved the following specification:

“That said bankrupt, Fillmore White, with the intent to conceal his financial condition, has destroyed, concealed and failed to keep books of account from which his financial condition might be ascertained, knowingly and with fraudulent intent so as to prevent said creditors from inquiring into the financial condition of said bankrupt.”

for the reason that the evidence showed that said bankrupt is a graduate of the University of California and duly licensed to practice dentistry in the State of California; that said bankrupt from time to time practiced his profession, but abandoned the same in the year 1907; that some time prior to the filing of said bankruptcy petition said bankrupt resumed the practice of his said profession in the City and County of San Francisco, and in conducting said profession kept no books except a rough memoranda or card-index, unintelligible to any one except said bankrupt, and that said card-index did not give a true condition of the bankrupt's business, said failure to keep books being [18] with the intent to conceal his financial condition and the status of his outstanding accounts. Said intent being shown by said failure to so keep said books.

2. That said Eva May Gill excepts to that part of the report of the referee in bankruptcy appearing on page 2 of said report to the effect that specification 2

appearing in said opposition to the discharge of said bankrupt is defective in this, that it does not set forth the facts concerning his fraudulent transfer of his property for the purpose of defrauding his creditors, and that said specification has not been proved. Said specification is as follows:

“That within the period of four (4) months immediately preceding the filing of the Petition in Bankruptcy by said bankrupt, Fillmore White, said bankrupt, transferred, removed, destroyed, concealed and permitted to be removed, destroyed and concealed, certain property belonging to said bankrupt with the intent to hinder, delay and defraud his said creditors and particularly said Eva May Gill.”

The testimony showed that said bankrupt, at the time of filing said Petition in Bankruptcy, was of approximately the age of thirty-eight years; that he graduated from the dental department of the University of California in the year 1898, and had been practicing his profession from time to time up to the year 1907, when he became secretary of the Robert White Company, a corporation, engaged in the administration of the assets of the Estate of Robert White, deceased, the father of said bankrupt, and earning a salary of \$200, a month, and held said position from 1907 to 1912.

That he had been a stockholder in said Robert White Company since the 8th day of July, 1914, at said time being the owner of 100 shares in said company, and from said time continued to be the owner of shares in said company. That on April 8th,

[19] 1908, Helen B. White, wife of said bankrupt, received 124 shares from said bankrupt which were later cancelled. That on the 20th day of November, 1912, said bankrupt again transferred to Helen B. White (his wife), 125 shares of the stock of said Robert White Company, being certificate No. 23, and representing his entire holdings in said company.

That on the 4th day of May, 1915, Emilie White, the mother of said bankrupt brought an action in the Superior Court in and for the City and County of San Francisco against said bankrupt and against said Helen B. White, his wife, and attached said stock; that said action was brought on a promissory note executed by said bankrupt and his said wife, the consideration for same being as testified to by said Emilie White, the mother of said bankrupt and plaintiff in said action, and by said bankrupt, as follows:

That the amount specified in said promissory note represented money advanced to said bankrupt while he was a student at the University of California in and prior to the year 1898. That said bankrupt at the time of his attendance at the University of California was living with his parents at said time, who were amply able to furnish said bankrupt with a college education; that said sums were advanced to him from time to time during his college course from the time of his entrance to his graduation; that said sums varied from small amounts from five to ten and up to one hundred dollars.

That said Emilie White kept no account or memoranda of the amounts advanced to said bankrupt



and was unable to state how the amount specified in said promissory note had been arrived at. That said bankrupt graduated from the University of California in the year 1898, and had made no efforts to repay said [20] money since said graduation and no demands had been made upon him for the repayment of the same by his mother or by any one in her behalf until the note above referred to was executed.

That in the latter part of the year 1914, and after said sums had been advanced to said bankrupt, by his said mother, as above stated, said bankrupt and his said wife executed a note for the sum of \$10,000, or thereabouts, said sum representing said alleged advance to said son while he was a student at the University of California.

That at the time of the execution of said note, on August 1st, 1914, to said Emilie White and for some time prior thereto, said bankrupt was indebted to said Eva May Gill.

That on the 5th day of March, 1914, said creditor, Eva May Gill, filed suit against said bankrupt in the Superior Court of the State of California, in and for the City and County of San Francisco, on a joint and several promissory note executed by said bankrupt and Marshall M. Giselman, for the sum of \$2,500, dated September 20th, 1912, and due six months after date, judgment being entered in favor of said Eva May Gill on January 4th, 1915. That at the time of said transfer of stock to said wife of said bankrupt, and at the time of the execution of the note of August 1st, 1914, by said bankrupt and his said wife, payable to the mother of said bankrupt was indebted to said



Eva May Gill in a sum exceeding \$3,000.

That the defendants in said action in which the mother of said bankrupt was plaintiff, defaulted and judgment was obtained on the 21st day of June, 1915, for the sum of \$10,136.15, and it was agreed between said Emilie White, the plaintiff therein, and the defendants (said bankrupt and his said [21] wife) that said wife of said bankrupt would transfer all the said stock to said Emilie White, the mother of said bankrupt, if the mother would satisfy the said judgment and that the said wife of said bankrupt be paid the sum of \$1,500. That said transfer was completed and on or about the 2d day of July, 1915, said proposition being made by the attorney for said defendants (said bankrupt and his wife).

That said Emilie White, the mother of said witness, testified that she did not keep any memoranda or books showing the advances made to said bankrupt; that she did not remember whether she had seen her said son and his wife sign the note, or whether she had ever seen said note at all; that she did not remember when she gave said note to her attorney to commence suit in said action; that she did not have any check-stubs showing alleged advances; that she did not remember seeing a certificate of stock issued to her for the stock supposed to be given in satisfaction of said judgment; that she stated that the reason said suit was instituted and said attachment levied was for the purpose of preventing said creditor Eva May Gill from obtaining the amount due her on a judgment entered by the Superior Court of the State of California in and for the City and

County of San Francisco, on about the 4th day of January, 1915, for a sum in excess of \$3,000.

That said bankrupt a short time prior to filing his petition in bankruptcy invested a sum in excess of \$3,000 in buying dental instruments, library and furnishing his office; that said money was so expended so that said bankrupt could claim said property as exempt.

That under said specification, and to prove the facts therein stated, said creditor Eva May Gill caused a subpoena to [22] be served upon said Helen B. White, the wife of said bankrupt; that in response thereto said Helen B. White appeared in court and was requested by said Eva May Gill to take the stand and be sworn in said proceedings, but upon advice of counsel said Helen B. White refused to be sworn in said action; that counsel for said wife and said bankrupt objected to said wife being sworn upon the ground that the wife could not testify for or against her said husband without his consent in said proceeding concerning transfer of property to the wife, for the reason that any testimony that might be developed would be a privileged communication and not permissible under the Federal Statutes or the laws of the State of California; that said creditor offered to prove, and intended to prove, that property of various kinds and character including said 125 shares of the stock in the Robert White Company had been transferred to said wife for the purpose of hindering, delaying and defrauding his said creditors and particularly said Eva May Gill. That said referee in bankruptcy sustained said ob-

jections and said Helen B. White was not required to testify in said proceeding.

That said referee should have required said Helen B. White to be sworn; that it could not be ascertained whether or not a question would require a privileged communication until questions were propounded to said witness.

That under the Federal Statutes and under the laws of the State of California, said Eva May Gill had the right to require and have the testimony of said Helen B. White.

That said Eva May Gill excepted and does here and now except to said ruling of said referee and to that part of said report of said referee.

3. That said Eva May Gill excepted and does here and [23] now except to the ruling and to the report of said referee in bankruptcy, appearing on page 5 of said report, to the effect that the third specification appearing in opposition to bankrupt's discharge do not constitute grounds of opposition to discharge. That said specification is as follows:

“That said bankrupt has been guilty of fraud upon said Eva May Gill, and has made false and fraudulent representations to said Eva Mil Gill, that is to say, as follows, to wit:

“That on the 20th day of March, 1912, Charles S. Laumeister, Peter P. Flood and Marshall W. Giselman made, executed and delivered to the husband of said creditor, Eva May Gill, a promissory note for the sum of Twenty-five hundred (\$2500) dollars, payable six (6) months after date. That said note was given by said makers

as the purchase price of certain shares of stock in the Reno Ruhl Gold Mining Company, a Nevada corporation, which, prior to the 20th day of March, 1912, was owned and held by said W. J. Gill, the husband of said Eva May Gill. That on or about the 20th day of July, 1912, said bankrupt Fillmore White, purchased from said Flood and Laumeister certain shares of stock owned and held by said Flood and Laumeister in the Reno Ruhl Gold Mining Company, and as a part consideration of said sale said bankrupt assumed and agreed to pay the said note so executed to said W. J. Gill.

“That on the 20th day of September, 1915, the day upon which the note executed by said Laumeister and Flood and Giselman fell due, said bankrupt induced said W. J. Gill to surrender up the said note of March 20th, 1912, to said bankrupt, and in lieu thereof to accept a joint and several note made and executed by said bankrupt and said Marshall W. Giselman, and endorsed by said Flood and Laumeister, and payable six (6) months after date.

“That on or about the 13th day of November, 1912, said W. J. Gill, in writing, endorsed and delivered said note of September 20th, 1912, to said Eva May Gill. That said W. J. Gill died on November 13th, 1912. That a short time before said note of September 20th, 1912, fell due said bankrupt persuaded said Eva May Gill, not to presently prosecute or take any proceedings towards the collection of said note and requested



an extension of time for the payment thereof. That said Eva May Gill complied with the request of said bankrupt for an extension of the payment of said note of September 20th, 1912. That said Eva May Gill was ignorant of the law providing that an extension of time granted to the makers of said note of September 20th, 1912, would legally prevent her from obtaining payment from the endorsers thereof. That each of said endorsers was and is financially able to pay the sum of money evidenced to be paid by said note.

“That the purpose and object of said bankrupt in applying for said extension of time was for the fraudulent purpose and object of relieving said endorsers from any liability on said note, and exonerating them from the payment [24] of the same, thereby cancelling the indebtedness of said bankrupt to said Laumeister and Flood and preventing said Eva May Gill from obtaining said money from said Laumeister and Flood.

“That after said endorsers on said note of September 20th, 1912, were relieved from said obligation to said Eva May Gill, said bankrupt failed, neglected and refused to pay said note of September 20th, 1912, or any part or portion thereof, claiming that said W. J. Gill, deceased, had made false and fraudulent representation to said bankrupt as to the value per ton of the ore that was taken from said mine and as to the paying character of said mine in general.



“That said Eva May Gill was compelled to bring suit in the Superior Court of the State of California, in and for the City and County of San Francisco, No. 55,135 on the register of said Superior Court, against said bankrupt, Fillmore White, for the collection of said note.

“That on the 23d day of December, 1914, said Superior Court, rendered judgment in favor of said Eva May Gill and against said bankrupt for the amount due on said promissory note of September 20th, 1912, with interest and costs of suit. That judgment thereon was entered on the 4th day of January, 1915. Said judgment is final and unsatisfied in whole or in part.

“That said bankrupt by fraudulently procuring said extension of time and thereby relieving the endorsers on said note of September 20th, 1912, prevented said Eva May Gill from legally proceeding against said endorsers who were, and now are, and each of them is, responsible and solvent, and were and are able to pay said note, and the whole amount of principal and interest thereof.”

That the only creditors of said bankrupt were members of his family, there being but a few claims against said bankrupt aggregating less than \$100.

That the purpose of the bankruptcy law is to aid and assist honest debtors who are being pressed by their creditors, and not to relieve a dishonest debtor from his obligations.

That said Eva May Gill offered to prove the above and foregoing specifications, but upon objection of

counsel said referee refused to allow said creditor to introduce testimony under said specifications, upon the grounds appearing in said report.

Dated February 5th, 1917.

Respectfully submitted,

R. H. COUNTRYMAN,

Attorney for said Creditor, Eva May Gill.

[Endorsed]: Filed Feb. 5, 1917, at 4 o'clock and  
—— Min. P. M. W. B. Maling, Clerk. By C. W.  
Calbreath, Deputy Clerk. [25]

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*In the Southern Division of the United States Dis-  
trict Court, for the Northern District of Cali-  
fornia, First Division.*

No. 9737.

In the Matter of FILLMORE WHITE,

Bankrupt.

**(Opinion and Order Confirming Report of Referee on  
Opposition to Discharge, Order Granting Dis-  
charge, and Order Overruling Exceptions to Said  
Report of Referee).**

R. G. HUNT, Esq., Attorney for Bankrupt.

R. H. COUNTRYMAN, Attorney for Creditor, Eva  
May Gill.

The report of the referee herein on opposition to discharge is confirmed, and the discharge will be granted.

The question of law presented as to whether the wife of the bankrupt was a competent witness who could be compelled to testify at the instance of the

creditor opposing bankrupt's discharge upon the hearing of such opposition before the referee need not be decided. It is only when the transfer of property with intent to defraud his creditors has been made by the bankrupt within four months immediately preceding the filing of his petition that such transfer is made a ground of opposition to his discharge. All the testimony shows, the referee finds, and counsel admitted at the argument of his exceptions before this Court, that the transfers to the wife of which he complains were made long before the beginning of the four months period. In such case the wife's testimony even if competent could not affect the result.

The exceptions to the referee's report will therefore be overruled, and the bankrupt's discharge granted.

March 22d, 1917.

M. T. DOOLING,  
Judge.

[Endorsed]: Filed Mar. 22, 1917, at 3 o'clock and  
—— min. P. M. W. B. Maling, Clerk. By Lyle S.  
Morris, Deputy Clerk. [26]

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UNITED STATES OF AMERICA.

*In the District Court of the United States, for the  
Northern District of California, First Division.*

No. 9737.

In the Matter of FILLMORE WHITE,  
In Bankruptcy.

**(Order of Discharge.)**

WHEREAS, Fillmore White of the City and County of San Francisco in said District, has been duly adjudged a bankrupt under the acts of Congress relating to bankruptcy, and appears to have conformed to all the requirements of law in that behalf:

It is therefore ORDERED BY THIS COURT, that said Fillmore White be DISCHARGED, from all debts and claims which are made provable by said acts against his estate, and which existed on the 17th day of November, A. D. 1915, on which day the petition for adjudication was filed by him; excepting such debts as are by law excepted from the operation of a discharge in bankruptcy.

WITNESS, the Honorable M. T. DOOLING, Judge of said District Court, and the seal thereof, this 22d day of March, A. D. 1917.

[Seal]

W. B. MALING,  
Clerk.

By T. L. Baldwin,  
Deputy Clerk.

[Endorsed]: Filed Mar. 22, 1917, at 4 o'clock and 30 min. P. M. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk. [27]

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*In the District Court of the United States, Northern  
District of California, First Division.*

No. 9737—IN BANKRUPTCY.

In the Matter of FILLMORE WHITE,  
Bankrupt.



**(Petition for Appeal and Order Allowing Appeal.)**

Eva May Gill, creditor of said bankrupt, considering herself aggrieved by the order made herein, on the 22d day of March, 1917, wherein and whereby an order of discharge of said bankrupt was made and the objections made by her to said discharge were overruled and denied, for the reasons and upon the grounds specified in her assignments of error herewith, does hereby appeal from said order to the United States Circuit Court of Appeal, for the Ninth Judicial Circuit, and prays that this appeal may be allowed and that a transcript of the record, proceedings and files upon which said order was made and entered as aforesaid, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and said appellant further prays that an order be made fixing the amount of security which the said appellant shall give and furnish upon said appeal.

And your petitioner will ever pray, etc.

Dated, San Francisco, Cal., Monday, April 2d, 1917.

R. H. COUNTRYMAN,

Attorney for said Creditor, Eva May Gill.

The foregoing Petition for Appeal is granted and the claim of appeal is allowed, petitioner filing bond in the sum of \$300, to be conditioned as required by law, for the payment of costs.

Dated April 2d, 1917.

M. T. DOOLING,

United States District Judge.



[Endorsed]: Filed Apr. 2, 1917, at 4 o'clock and  
— min. P. M. W. B. Maling, Clerk. By Lyle S.  
Morris, Deputy Clerk. [28]

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*In the District Court of the United States, Northern  
District of California, First Division.*

No. 9737—IN BANKRUPTCY.

In the Matter of FILLMORE WHITE,

Bankrupt.

**Assignment of Errors on Appeal.**

Eva May Gill, creditor of said bankrupt, and appellant herein does hereby file the following Assignments of Errors upon which she will rely upon her appeal from the order entered herein on the 22d day of March, 1917, discharging the said bankrupt:

1. That the District Court of the United States in and for the Northern District of California erred in entering said order of discharge.

2. That the said Court erred in overruling and denying the objections of this appellant to any discharge of said bankrupt.

3. That said Court erred in overruling the exceptions and each of them of appellant to the report of the referee on the opposition to discharge.

4. That the Court erred in holding that the testimony of Helen B. White, wife of said bankrupt, should not be taken and that said Helen B. White could not even be sworn as a witness.

5. Said Court erred in assuming that all or any of the transfers objected to by appellant were made

more than four (4) months prior to the adjudication in bankruptcy.

6. Said Court erred in holding that it is only when the transfer of property with intent to defraud his creditors has been made by the bankrupt within four (4) months immediately preceding the filing of his petition that such transfer is made a ground of opposition to his discharge. [29]

7. The Court erred in holding that the bankrupt did keep proper books of account.

8. The Court erred in holding that the transfer of the stock of the Robert White Company to the mother of the bankrupt was a legitimate transfer.

9. The Court erred in approving the report of the referee in excluding evidence as to the third specification of the proposition of the discharge showing the method and action of the bankrupt in connection with said creditor concerning the original obligation from said bankrupt to said creditor.

Wherefore, said creditor prays that said order be reversed, and said district court be directed to enter an order refusing to discharge said bankrupt, and that such other relief may be awarded as the facts and the law demand and justify.

R. H. COUNTRYMAN,

Attorney for said Creditor, Eva May Gill.

[Endorsed]: Filed Apr. 2, 1917, at 4 o'clock and  
— min. P. M. W. B. Maling, Clerk. By Lyle S.  
Morris, Deputy Clerk. [30]

*In the District Court of the United States, Northern  
District of California, First Division.*

No. 9737—IN BANKRUPTCY.

In the Matter of FILLMORE WHITE,  
Bankrupt.

**Citation on Appeal—Copy.**

United States of America,—ss.

The President of the United States to Fillmore  
White, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the clerk's office in the United States District Court for the Northern District of California, First Division, wherein Eva May Gill is the appellant and you are the appellee, to show cause, if any there be, why the order discharging you as a bankrupt rendered against the said appellant as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable M. T. DOOLING,  
United States District Judge for the Northern District of California, this 2d day of April, A. D. 1917.

M. T. DOOLING,  
United States District Judge.

[Endorsed]: Filed Apr. 2, 1917, at 4 o'clock and  
— min. P. M. W. B. Maling, Clerk. By Lyle S.  
Morris, Deputy Clerk. [31]

*In the District Court of the United States, Northern  
District of California, First Division.*

No. 9737—IN BANKRUPTCY.

In the Matter of FILLMORE WHITE,

Bankrupt.

**(Affidavit of Service of Citation on Appeal.)**

United States of America,

State of California,

City and County of San Francisco,—ss.

On this 3d day of April, 1917, personally appeared before me, George H. Cavalier, the subscriber, and makes oath that he delivered a true copy of the Citation filed herein on April 2d, 1917, to R. G. Hunt, by delivering to and leaving said copy with his stenographer at the law office of said R. G. Hunt, Flat-iron Building, San Francisco.

GEORGE H. CAVALIER.

Subscribed and sworn to before me this 3d day of April, 1917.

[Seal]

HENRIETTA HARPER,

Notary Public in and for said City and County of San Francisco.

[Endorsed]: Filed Apr. 3, 1917, at 3 o'clock and 45 min. P. M. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [32]

*In the District Court of the United States, Northern  
District of California, First Division.*

No. 9737—IN BANKRUPTCY.

In the Matter of FILLMORE WHITE,  
Bankrupt.

**Bond on Appeal.**

Know All Men by These Presents: That we, Eva May Gill, as principal, and the United States Fidelity & Guaranty Company, as surety, are held and firmly bound unto Fillmore White, the bankrupt in the above-entitled matter, in the sum of Three Hundred (\$300) Dollars, lawful money of the United States, to be paid to him or his executors, administrators, successors and assigns, to which payment well and truly to be made, we bind ourselves and each of us jointly and severally and each of our heirs, executors, administrators, successors and assigns by these presents.

Sealed with our seals, and dated this 2d day of April, A. D. 1917.

WHEREAS, the above-named Eva May Gill has obtained an appeal to the Circuit Court of Appeals of the United States to correct and reverse the order of the U. S. District Court for the Ninth District of California in the above-entitled matter, overruling the exceptions to the report of the referee on opposition to discharge and confirming said report of said Referee and granting a discharge to said Fillmore White, bankrupt.



NOW, THEREFORE, the condition of this obligation is such that if the above-named Eva May Gill shall prosecute her said appeal to effect and answer all costs if it fails to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

EVA MAY GILL.

By R. H. COUNTRYMAN,

Her Attorney.

[Seal] UNITED STATES FIDELITY & GUAR-  
ANTY COMPANY,

By WILL LOVE,

Its Attorney in Fact.

By H. V. D. JOHNS,

Its Attorney in Fact. [33]

State of California,

City and County of San Francisco,—ss.

On this 2d day of April, in the year 1917, before me, M. J. Cleveland, a notary public, in and for the City and County of San Francisco, personally appeared H. V. D. Johns and Will Love known to me to be the persons whose names are subscribed to the within and foregoing instrument as the attorneys in fact of the United States Fidelity & Guaranty Company, and acknowledged to me that they subscribed the name of the United States Fidelity and Guaranty Company thereto, as principal, and their own names as its attorneys in fact.

*Notary Public in and for said City and County of  
San Francisco.*

[Seal]

M. J. CLEVELAND,

Notary Public in and for Said City and County of  
San Francisco.

Approved this 2d day of April, 1917.

M. T. DOOLING,

Judge of the United States District Court.

[Endorsed]: Filed Apr. 2, 1917, at 4 o'clock and  
—— Min. P. M. W. B. Maling, Clerk. By Lyle S.  
Morris, Deputy Clerk. [34]

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*In the District Court of the United States, Northern  
District of California, First Division.*

No. 9737—IN BANKRUPTCY.

In the Matter of FILLMORE WHITE,

Bankrupt.

**Order Extending Time Until May 15, 1917, to File  
Record in Appellate Court.**

For satisfactory reasons appearing to the Court,  
the time for the filing of the record in the cause in  
the Circuit Court of Appeals, Ninth Judicial Circuit,  
pursuant to the appeal sued out and allowed in the  
above-entitled matter is hereby granted until the  
15th day of May, 1917.

No time heretofore granted by order of Court.

No time *heretofore by* stipulation of counsel.

Dated May 1st, 1917.

WM. W. MORROW,

Judge of the United States Circuit Court of Appeals.

[Endorsed]: Filed May 2, 1917, at 11 o'clock and  
—— min. A. M. W. B. Maling, Clerk. By Lyle S.  
Morris Deputy Clerk. [35]

**Certificate of Clerk U. S. District Court to Transcript  
on Appeal.**

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California do hereby certify that the foregoing 35 pages, numbered from 1 to 35, inclusive, contain a full, true, and correct transcript of certain records and proceedings, in the matter of Fillmore White, in Bankruptcy, No. 9737, as the same now remain on file and of record in the office of the clerk of said court; said transcript having been prepared pursuant to and in accordance with the "Praeceptum for Transcript on Appeal" (copy of which is embodied in this transcript), and the instructions of the attorney for appellant herein.

I further certify that the cost for preparing and certifying the foregoing transcript on appeal, is the sum of Eighteen Dollars and Sixty Cents (\$18.60), and that the same has been paid to me by the attorney for the appellant herein.

Annexed hereto is the original citation on appeal, issued herein, page 37.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 15th day of May, A. D. 1917.

[Seal]

WALTER B. MALING,

Clerk.

By C. W. Calbreath,

Deputy Clerk.

CMT.

[36]

*In the District Court of the United States, Northern  
District of California, First Division.*

No. 9737—IN BANKRUPTCY.

In the Matter of FILLMORE WHITE,

Bankrupt.

**Citation on Appeal—Original.**

United States of America,—ss.

The President of the United States to Fillmore  
White, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the clerk's office in the United States District Court for the Northern District of California, First Division, wherein Eva May Gill is the appellant and you are the appellee, to show cause, if any there be, why the order discharging you as a bankrupt rendered against the said appellant as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable M. T. DOOLING,  
United States District Judge for the Northern Dis-  
trict of California, this 2d day of April, A. D. 1917.

M. T. DOOLING,  
United States District Judge. [37]

[Endorsed]: No. 9737. (Bankruptcy.) In the District Court of the United States, Northern District of California, First Division. In the Matter of Fillmore White, Bankrupt. Citation on Appeal—Original. Filed at 4 o'clock and ——— Min. P. M. Apr. 2, 1917. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [38]

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[Endorsed]: No. 2999. United States Circuit Court of Appeals for the Ninth Circuit. Eva May Gill, Appellant, vs. Fillmore White, Appellee. Transcript of Record. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Filed May 15, 1917.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.





No. 2999

IN THE  
**United States Circuit Court of Appeals**  
For the Ninth Circuit

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EVA MAY GILL,

*Appellant,*

VS.

FILLMORE WHITE,

*Appellee.*

BRIEF FOR APPELLANT.

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R. H. COUNTRYMAN,

*Attorney for Appellant.*



No. 2999

IN THE  
**United States Circuit Court of Appeals**

**For the Ninth Circuit**

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EVA MAY GILL,	}
<i>Appellant,</i>	
VS.	
FILLMORE WHITE,	}
<i>Appellee.</i>	

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**BRIEF FOR APPELLANT.**

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**Statement of the Case.**

Fillmore White, the bankrupt herein, is a dentist by profession. He is a graduate of the University of California and duly licensed to practice dentistry in the State of California (p. 7 Tr.). The bankrupt is approximately of the age of thirty-eight years. He graduated from the dental department of the University of California in the year 1898 and practiced his profession until the year 1907 when he became secretary of the Robert White Company, a corporation, engaged in the administration of the assets of the estate of Robert White, deceased, father of said bankrupt, at a salary of

\$200 a month and held that position from 1907 to 1912 (p. 21 Tr.).

The Robert White Company owns a large amount of property. The bankrupt was the owner of 100 shares of stock in said company. On April 8, 1908, Helen B. White, wife of the bankrupt, received 124 shares of stock of said Robert White Company from said bankrupt, which shares were later cancelled (p. 22 Tr.).

On November 20, 1912, the bankrupt again transferred to Helen B. White, his wife, 125 shares of stock of the Robert White Company represented by Certificate 23 and representing his entire holdings in said company (pp. 21 and 22 Tr.).

On May 4, 1914, Emilie E. White, mother of bankrupt, commenced an action in the Superior Court of San Francisco against the bankrupt and his wife and attached said stock. Said action was brought to recover on a promissory note executed by the bankrupt and his wife (p. 22 Tr.). This note was for the sum of \$10,000. The consideration of said note was that during the time the bankrupt was a student at the University of California, when he was living with his parents, his parents advanced to him from time to time small sums of money ranging from \$5 to \$10 and up to \$100. His mother kept no account or memoranda of these amounts so advanced to the bankrupt and was unable to state by what process of mathematical computation the amount of \$10,000, the purported amount named



in the note, was reached. The bankrupt graduated in the year 1898 and although something over sixteen years had elapsed no attempt had been made to obtain any promissory note or enforce any claim of the mother against the bankrupt until appellant obtained a judgment against the bankrupt (pp. 22 and 23 Tr.).

The note to Emilie White, the mother of the bankrupt, is dated August 1, 1914. On March 5, 1914, appellant creditor brought a suit in the Superior Court of San Francisco on a promissory note executed by the bankrupt, and judgment was rendered in favor of appellant in December, 1914.

Appellant is a widow. She resides in Sparks, Nevada. She has no knowledge of business. On March 20, 1912, Charles S. Laumeister, Peter P. Flood and Marshall W. Giselman bought certain shares of stock in the Reno Ruhl Gold Mining Company from W. J. Gill, the husband of appellant, and gave Mr. Gill a promissory note as part of the purchase price thereof (pp. 26 and 27 Tr.). On or about July 20, 1912, the bankrupt bought from Flood and Laumeister certain of these shares of stock and as a part consideration thereof agreed to pay the note to Mr. Gill (p. 27 Tr.).

On September 20, 1915, when this note became due, the bankrupt induced Mr. Gill to surrender the note of March 20, 1912, and to accept in lieu thereof a note executed by the bankrupt and Mr. Giselman and endorsed by Flood and Laumeister (p. 27 Tr.).

On November 13, 1912, being then on his death-bed, Mr. Gill endorsed and delivered the latter note to Mrs. Gill. Mr. Gill died on November 13, 1912. Mrs. Gill did not know the legal rules exonerating endorsers on promissory notes for failure to present the note for payment, or by granting extensions of time. The bankrupt took advantage of the ignorance of the law of Mrs. Gill and persuaded her to extend the time of payment on the note of September 12, 1912, and thereby legally released the endorsers thereon. The object of the bankrupt in obtaining this extension of time was to thereby enable him to cancel his indebtedness to Flood and Laumeister and prevent Mrs. Gill from obtaining her money from these two endorsers (pp. 27 and 28 Tr.).

The judgment in favor of Mrs. Gill is final and is wholly unsatisfied (p. 29 Tr.).

On May 4, 1915, Mrs. White, the mother of the bankrupt, brought suit on her promissory note and attached his stock in the Robert White Company (p. 22 Tr.). The bankrupt and his wife defaulted in the suit brought by the mother of the bankrupt and all of the stock in the Robert White Company was delivered to the mother in satisfaction of said amount due on said promissory note, and the further sum of \$1500 paid by the mother of the bankrupt to the wife of the bankrupt (p. 24 Tr.). The only creditors of the bankrupt were members of his family, there being but a few claims against the bankrupt aggregating \$100 (p. 29 Tr.).

The only property Mr. Gill had was the promissory note executed to him by the bankrupt and Marshall Gishman and endorsed by Flood and Laumeister.

The appellant desired to take the testimony of the wife of the bankrupt. On the advice of counsel, Helen B. White, the wife of the bankrupt, refused to be sworn. The bankrupt also objected to his wife being sworn, on the ground that the wife could not testify for or against her husband without his consent in any proceeding concerning the transfer of property to his wife, for the reason that any testimony that might be developed would be a privileged communication and not permissible under the federal statutes or the laws of the State of California (p. 25 Tr.). Mrs. Gill offered to prove that property of various kinds and character including the 125 shares of stock in the Robert White Company had been transferred by the bankrupt to his wife for the purpose of hindering, delaying and defrauding his creditors, and, particularly, Mrs. Gill (p. 29 Tr.).

The referee sustained these objections and Helen B. White was not required to testify. The referee would not even permit Helen B. White *to be sworn* as a witness (pp. 25-26 Tr.).

The bald facts are that the bankrupt bought some stock in a mining company from Flood and Laumeister and agreed as part of the purchase price to pay a promissory note given by Flood

and Laumeister to Mr. Gill. Mr. Gill died, and the bankrupt persuaded Mrs. Gill to legally waive any recourse against Flood and Laumeister on their endorsement of the promissory note. Mrs. Gill brought suit against the bankrupt and obtained judgment. To evade the payment of this judgment the mother of the bankrupt obtained from the bankrupt and his wife a promissory note for amounts which were at least fourteen years old, and of which no record of any kind had ever been kept, simply being gifts of the parents of the bankrupt to the bankrupt during his college career. They went through the form of selling to the mother of the bankrupt all of the interest of the bankrupt in the corporation which represented the assets of his father's estate. This was done for the purpose of defrauding appellant. The bankrupt having induced Mrs. Gill to legally release Flood and Laumeister proceeded to evade payment of the note to her by selling his stock in payment of these long over-due amounts—amounts which the mother could not fix and of which she had no account. The creditor claims that the wife of the bankrupt not only holds shares in the Robert White Company belonging to the bankrupt, but also has other property of the bankrupt. The referee would not permit the wife even to be sworn as a witness.

It further appears that a short time before filing his petition in bankruptcy the bankrupt spent a sum of money in excess of \$3000 in buying dental



instruments, library and in elaborately furnishing and equipping dental offices. These moneys were expended so that the bankrupt could claim the property of his office was exempt (p. 25 Tr.).

If the ruling of the referee is confirmed, there will be a very easy method provided for a bankrupt to defraud his creditors. All he will have to do will be to turn liquid securities over to his wife. When his wife is called to testify, the bankrupt will refuse his consent to his wife giving any testimony in the matter, on the ground that it violates confidential communications, and the wife either keeps or returns the securities to the bankrupt. We think that the mere statement of such a ruling is its own refutation.

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### **Brief of the Argument.**

1. A disclosure of the transfer of property from the husband to his wife is not a privileged communication in California and does not fall within the inhibition of Section 1881 of the C. C. P. of the State of California; Stats. of Cal., 1850-51, Section 395, p. 114;

Stats. of Cal., 1863-4, p. 771;

Sec. 1881, C. C. P., subdiv. 1, as originally enacted in 1872;

Sec. 1881, subdiv. 1, C. C. P., as amended;

Stats. of Cal. 1907, p. 87;

Poulson v. Stanley, 122 Cal. 655;



Sharon v. Sharon, 79 Cal. 677;  
 Civ. Code of Cal., Sec. 158;  
 Civ. Code of Cal., Sec. 2224;  
 Brison v. Brison, 75 Cal. 529;  
 Brison v. Brison, 90 Cal. 330;  
 Bradley v. Bradley, 165 Cal. 237;  
 Meyers v. Reinstein, 67 Cal. 89;  
 Sedgwick v. Sedgwick, 52 Cal. 336;  
 Estate of McCausland, 52 Cal. 568;  
 Chase v. Evoy, 51 Cal. 618;  
 Satterlee v. Bliss, 36 Cal. 509;  
 Title Ins. & Trust Co. v. Ingersoll, 153 Cal. 1;  
 Title Ins. & Trust Co. v. Ingersoll, 158 Cal.  
 473;  
 Yoakum v. Kingery, 126 Cal. 30;  
 Fanning v. Grant, 156 Cal. 279;  
 Estate of Niccolls, 164 Cal. 368;  
 Lenninger v. Lenninger, 167 Cal. 297;  
 Cullen v. Bisbee, 168 Cal. 695;  
 Pabst v. Shearer, 172 Cal. 239;  
 Killian v. Killian, 10 Cal. App. 312;  
 In re Carlin, 19 Cal. App. 168;  
 Eaton v. Locey, 22 Cal. App. 766;  
 Volquards v. Myers, 23 Cal. App. 500;  
 Giuffre v. Lauricella, 25 Cal. App. 422;  
 Brunner v. Title Ins. & Tr. Co., 26 Cal.  
 App. 35;  
 Alexander v. Bosworth, 26 Cal. App. 589.

2. Nondisclosure of communications from husband to wife is confined strictly to confidential communications in all jurisdictions.

- Jones on Evidence, Sec. 736;  
 Sackman v. Thomas, 24 Wash. 660; s. c.  
 64 Pac. 819;  
 French v. Ware, 65 Vt. 338; s. c. 26 Atl. 1096;  
 Hunt v. Eaton, 55 Mich. 362; s. c. 21 N. W.  
 429;  
 Chunot v. Larson, 43 Wis. 536; 28 Am. Rep.  
 567;  
 Hanks v. Van Garder, 59 Iowa 179; s. c.  
 13 N. W. 103;  
 Chesley v. Chesley, 54 Mo. 347;  
 Quade v. Fisher, 63 Mo. 325;  
 Crook v. Henry, 25 Wis. 569;  
 Sumner v. Cooke, 51 Ala. 521;  
 Robison v. Robison, 44 Ala. 227;  
 Mitchell v. Hughes, 24 Ill. App. 308;  
 Gifford v. Wilkins, 24 Ill. App. 367;  
 Sauter v. Scrutchfield, 28 Mo. App. 150;  
 Taylor v. Duesterberg, 109 Ind. 165;  
 Curry v. Stephens, 84 Mo. 442;  
 Blabon v. Gilchrist, 67 Wis. 38;  
 Degenhart v. Schmidt, 7 Mo. App. 117;  
 Teckenbrock v. McLaughlin, 25 Mo. App.  
 524-526;  
 Darrier v. Darrier, 58 Mo. 222;  
 Schmied v. Frank, 86 Ind. 250, 257;  
 O'Connor v. Hartford Fire Ins. Co., 31 Wis.  
 160, 166;  
 Crook v. Henry, 25 Wis. 569;  
 Southwick v. Southwick, 49 N. Y. 510;  
 Sedgwick v. Tucker, 90 Ind. 271;

Beitman v. Hopkins, 109 Ind. 179; 9 N. E. 720;  
 Hagerman v. Wigent, 108 Mich. 192; 65 N. W. 756;  
 Moeckel v. Heim, 134 Mo. 576; 36 S. W. 226;  
 Parkhurst v. Berdell, 110 N. Y. 386; 6 Am. St. Rep. 384;  
 Schaffner v. Reuter, 37 Barb. (N. Y.) 44;  
 Wood v. Chetwood, 27 N. J. Eq. 311;  
 Edwards v. Dismukes, 53 Tex. 605.

3. Upon the transfer of any property from the bankrupt to his wife, the wife became the trustee of the bankrupt.

Dufour v. Weissberger, 172 Cal. 223;  
 Cooney v. Glynn, 157 Cal. 583;  
 Martin v. Lawrence, 156 Cal. 191;  
 Fagan v. Lentz, 156 Cal. 681;  
 Bollinger v. Bollinger, 154 Cal. 695;  
 Crabtree v. Potter, 150 Cal. 710;  
 Brison v. Brison, 75 Cal. 525;  
 Dieckmann v. Merkh. 20 Cal. App. 655;  
 Tench v. McMeekan, 17 Cal. App. 14;  
 Sanguinetti v. Rossen, 12 Cal. App. 623;  
 Chamberlain v. Chamberlain, 7 Cal. App. 634;  
 Noble v. Hutton, 7 Cal. App. 14.

4. Under the federal law, Helen B. White was a competent and compellable witness in any inquiry concerning the acts, conduct or property of her bankrupt husband.

In re Worrell, 10 Am. Bk. Rep. 744;  
 In re Hoffman, 28 Am. Bk. Rep. 680;  
 In re Foerst, 93 Fed. 190;  
 In re Thompson, 28 Am. Bk. Rep. 794;  
 In re Kesler, 35 Am. Bk. Rep. 30.

5. Fraudulent transfer of property by a bankrupt to his wife may be attacked although made more than four months prior to the bankruptcy.

In re Schenck, 116 Fed. 544;  
 In re Toothaker Bros., 128 Fed. 187; s. c.  
 12 Am. Bk. Rep. 100.

6. A bankrupt will be refused his discharge if he knowingly and fraudulently conceals his interest in any property.

In re Becker, 106 Fed. 754.

7. Dealings between near relatives should be scrutinized with care.

Remington on Bankruptcy, Secs. 556, 800,  
 854.

8. Repetitions of "I don't know" or "I don't remember" as to matters undoubtedly within the witness's knowledge or memory may indicate falsehood or fraud.

Secs. 558 $\frac{3}{4}$  and 1568 of Remington on Bankruptcy.

9. A mere tacit understanding between parties to work to a common and unlawful purpose is all that is necessary to constitute a conspiracy to

defraud; and it may be proved by circumstantial evidence even in the face of uncontradicted testimony.

Remington v. Bankruptcy, Secs. 558 $\frac{1}{8}$ , 558 $\frac{1}{4}$ ,  
558 $\frac{3}{4}$ , 856 $\frac{1}{8}$ , 856 $\frac{1}{4}$ , 2648, 2649, 2650.

10. In the investigation of questions of fraud, great latitude is allowed in the admission of evidence.

Questions of fraud can scarcely ever be proved by direct evidence; hence the necessity for the admission of all the circumstances fairly connected with the transaction.

Remington on Bankruptcy, Secs. 856 $\frac{3}{4}$ , 1209,  
1213, 1496 $\frac{1}{4}$ , 1496 $\frac{1}{2}$ , 1750, 1750 $\frac{1}{2}$ .

11. A bankrupt has no constitutional right to a discharge.

Sec. 2466, Remington on Bankruptcy.

12. Grounds for refusing a discharge in bankruptcy.

Secs. 346, 356 and 358, Brandenburg on  
Bankruptcy;

In re Feldstein, 115 Fed. 259; s. c. 22 Am.  
Bk. Rep. 160.

13. Debts to relatives should be in account books.  
Sec. 2549 $\frac{1}{2}$ , Remington on Bankruptcy.

14. Evidence need not be pleaded.

In re Fricce, 96 Fed. 611; s. c. 2 Am. Bk. Rep.  
676.



15. Intermingling funds of wife with those of bankrupt held sufficient to bar a discharge.

Bragassa v. St. Louis Cycle Co., 107 Fed. 77.

16. If bankrupt conveys property to his wife in fraud of his creditors and omits same from the schedules he is not entitled to a discharge.

In re Skinner, 97 Fed. 190.

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### Argument.

The Statutes of 1850-51, to which reference is made, read as follows:

“A husband shall not be a witness for or against his wife, nor a wife for or against her husband; nor can either, during the marriage or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this provision does not apply to a civil action or proceeding by one against the other.”

This section was amended so as to read as follows (Statutes 1863-4, p. 771):

“A husband may be a witness for or against his wife, and a wife may be a witness for or against her husband, and where husband and wife are parties to any action or proceeding, they, or either of them, may be examined as witnesses in their own behalf, or in behalf of each other, or in behalf of any of the parties thereto, the same as any other witness; but this section shall not apply to cases of divorce, neither shall any husband or wife be competent or compellable to disclose any communication

made to him or her by the other during marriage.”

Section 1881 of the Code of Civil Procedure contains the following preamble:

“There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases:”

Subdivision 1 of Section 1881, C. C. P., as originally enacted, reads as follows:

“A husband cannot be examined for or against his wife without her consent, nor a wife for or against her husband, without his consent; nor can either, during the marriage or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other.”

Subdivision 1 of Section 1888, C. C. P., was amended (Statutes 1907, p. 87) to read as follows:

“A husband cannot be examined for or against his wife without her consent; nor a wife for or against her husband without his consent; nor can either, during the marriage, or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other; or in an

action brought by husband or wife against another person for the alienation of the affections of either husband or wife; or in an action for damages against another person for adultery committed by either husband or wife."

It will be observed that the object and purpose of section 1881, C. C. P., subd. 1, is to "encourage confidence and to preserve it inviolate" by permitting a husband or wife to make a "communication" to his or her spouse, without fear that such "communication" will be disclosed on the witness stand, subject to certain exceptions.

The delivery of a deed by a husband to his wife is not a privileged communication.

*Poulson v. Stanley*, 122 Cal. 655.

An assignment of a claim by a husband to his wife is not a privileged communication.

*Hanks v. Van Garder*, 59 Iowa 179; 13 N. W. 103.

In *Sharon v. Sharon*, 79 Cal. 677, it is said:

"The burden is upon the party seeking to suppress the evidence to show that it is within the terms of the statute, and it must appear that the party learned the matter in question only as counsel, or attorney, or solicitor for the party, and not in any other way, and that it was received professionally, and in the course of business and communications made by a third party with a view to employ the witness as an attorney for the party, are not privileged as confidential, unless it be shown that such communications are authorized to be made by the party for whom such a person assumed to act;

nor does the rule apply to conversations had between the attorney and a third party, or between the third parties in the presence of the attorney and client. The communications must be confidential, and so regarded, at least by the client, at the time. The presumption is that all communications between the attorney and client in the course of professional employment are confidential, but this is a presumption that may be rebutted, and if it clearly appears that the same were not intended by the client to have been confidential, it is not privileged."

The disclosure of a written communication from one spouse to another is as much within the inhibition of the section as the disclosure of an oral communication.

If opposing counsel is right in his construction of Section 1881, C. C. P., a written agreement between husband and wife would be inadmissible in evidence because of the inhibition of the section. The section draws no distinction between a written communication and an oral communication; therefore if the bankrupt's wife had made a written declaration of trust as to the shares of stock she held in the Robert White Company, this declaration of trust would have been rejected and refused admission in evidence.

If Mr. and Mrs. White had entered into a solemn written agreement, such written agreement would be inadmissible in evidence on the theory of appellee.

Section 158, Civil Code, reads as follows:

"Either husband or wife may enter into any engagement or transaction with the other, or



with any other person, respecting property, which either might, if unmarried, subject, in transactions between themselves, to the general rules which control the actions of persons occupying confidential relations with each other, as defined by the title on trusts."

If the contention of appellee is sound, neither husband nor wife may testify concerning an agreement made pursuant to Section 158 of the Civil Code, because such testimony would be the disclosure of a communication, either written or oral, from one spouse to another. It is evident that any agreement, written or oral, between the spouses relative to their property rights does not come within the word or term "communication", as used in Section 1881. Such agreements as to property rights, or the title to the property of the respective spouses, or the transmutation of the separate property of one spouse into community property, or of community property into the separate property of one of the spouses, are not inhibited "communications between the spouses.

Section 2224 of the Civil Code of California, reads as follows:

"One who obtains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it."

The latest case in California, so far as we are at present advised, on the subject of confidential



communications between a husband and a wife is *Savings Union Bank & Trust Company v. Crowley*, decided by the Supreme Court of the State of California on November 23, 1917,

159 Pac. 194.

In its opinion therein, the court said:

“The remaining point made by appellant is that the court erred in permitting respondent to testify to declarations of her husband concerning the delivery of the notes and certificates of stock to her, on the ground that by the law of this state neither spouse can, without the consent of the other, testify as to any communications made by one to the other during marriage, citing section 1881, subdivision one, Code of Civil Procedure. Respondent contends that no decision in this jurisdiction has extended the restriction beyond confidential communications, and by reason of the freedom of contract between husband and wife either should be allowed to testify freely to business communications. Section 1881 declares that the rule there stated excluding testimony by one spouse of declarations by the other made during marriage ‘does not apply to a civil action or proceeding by one against the other.’ The Civil Code (Sec. 158) provides that ‘either husband or wife may enter into any engagements or transactions with the other, or with any other person, respecting property, which either might if unmarried.’ The protection of the right to contract with each other respecting their separate property requires that each should be allowed to testify concerning such contracts, in case of an action between them thereon. This is such an action or proceeding within the meaning of section 1881, and the prohibition therein does not apply. Under that section the wife can testify to communications made to her

by her husband constituting the contract between them, or affecting her rights thereunder. *Emmons v. Barton*, 109 Cal. 669, was not a case of that character, and what is there said has no application here."

Such evidence is admissible in an action between the husband and wife where the plaintiff is claiming that the defendant made a certain contract or agreement, or held the property in trust under certain conditions, and either written or oral evidence of those conditions are admissible in the suit between the husband and wife.

The object and purpose of section 1881 is to prevent the introduction in evidence of communications between the spouses on the ground of public policy "to encourage confidence and to preserve it inviolate", but no confidence is discouraged or violated by evidence showing the condition of title to property, or by showing that the real title to property which is apparently vested in one spouse is really vested in the other spouse. No confidence is disturbed by showing the truth as to the condition of the title to real or personal property. No confidence is disturbed when one spouse testifies that by the agreement between him and his wife the title to real property which was apparently of record in her name is really the property of the husband.

The original rules of evidence prohibited any party from testifying for fear he would commit perjury on account of his interest in the transaction. Those rules have been entirely changed, and

now any party to an action may testify. The law no longer presumes or fears that parties to an action will perjure themselves.

Rules of evidence are enacted for the purpose of enabling courts in an orderly procedure to judicially ascertain the truth; they are not enacted as a shield to prohibit the presentation of the facts of the controversy, or to shut out the truth.

On the grounds of public policy there are certain privileged communications. Evidence of these communications, obviously, is refused because it is for the best interests of society that the disclosure of confidential communications between the various classes of persons specified in section 1881, C. C. P., should be denied. Section 1880, C. C. P., is enacted for the purpose of preventing fraud by prohibiting any party to a transaction to testify when he is the plaintiff in an action or has a claim against an estate, because the party against whom the claim is made cannot testify in opposition thereto, and fraudulent claims might be presented against the estates of deceased persons. In order to prevent the presentation of such fraudulent claims, section 1880 has been enacted, but that section never applies to cases where the plaintiff is claiming his own property on the theory that the deceased was a bailee or custodian, or trustee of the property, and that the real title thereto is vested in the plaintiff.

C. C. P., Section 1880, subdiv. 3, reads as follows:

“Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted, against an executor or administrator upon a claim, or demand against the estate of a deceased person, as to any matter or fact occurring before the death of such deceased person.”

Lack of consideration for any contract may always be shown. As a husband and wife may deal with each other as to property rights in the same manner as if they were single, there is no reason why the same rules as to showing consideration or lack of consideration should not be adopted and followed and used in transactions and contracts between the husband and wife as in transactions between either spouse and a third person. When a husband and wife deal with each other as to property rights, they set at large all questions or privileged or “confidential” communications, and are subject to the same rules of substantive law, and of evidence, as are other parties engaged in contracts of a similar character. If this is not true, then a husband and wife may not contract with each other as to property rights in the same way as if they were single, but they may only so contract subject to the limitation as to the disclosure of confidential communications. But section 158 of the Civil Code makes no such limitation on their contractual rights, and we submit that no such limitation should be read into the section by judicial construction and interpretation.



Business communications between a husband and a wife are not confidential communications. In all business matters involving the property rights, the matrimonial partnership has no more evidentiary secrets than has any other partnership.

The object of an examination of the bankrupt and of witnesses is to enable creditors to find grounds of opposition to the bankrupt's discharge, if any exists, and to enable the trustee to discover assets of the estate which may be applied to the payment of the bankrupt's estate.

In re Horgan, 98 Fed. 414; s. c. 39 C. C. A. 118;

Under the bankruptcy law, an unlawful preference given within four months of the bankruptcy is vitiated by the adjudication of bankruptcy.

In re Gray, 3 Am. Bk. Rep. 647;

Fouche v. Shearer, 172 Fed. 592;

Henkel v. Seider, 162 Fed. 553.

Therefore, it is illogical to attempt to confine fraudulent transfers solely to the four months' preference period. We think a fraudulent transfer of property made four months before the adjudication of bankruptcy is not validated, and the fraud is not removed, by the four months' limitation of time. It is a cardinal rule that fraud vitiates all things. It cannot be, and we think never was, the intention of the Bankruptcy Act to permit a bankrupt to fraudulently transfer his property, and wait four months and one day, and



then file a petition in bankruptcy and obtain an adjudication, and thereby deprive his creditors of the property fraudulently transferred, or prevent the creditors from investigating to ascertain the circumstances and conditions under which the fraudulent conveyance was attempted to be made by and between the bankrupt and his fraudulent grantee or transferee.

In the case at bar, we are not able to definitely state whether the transfers to Helen B. White, wife of the bankrupt, were made within four months of the bankruptcy. Our position is that the four months' period is a false quantity; that if a transfer was fraudulently made, it is not validated by the mere lapse of four months of time before the adjudication of bankruptcy, and, therefore, we assert *arguendo* that it is immaterial, in this discussion, whether or not the fraudulent transfer from the bankrupt to his wife was made within the four months' preference period or prior thereto. The act does not permit an illegal preference to be made within four months of the bankruptcy. If an attempted preference is fraudulently made the element of time is immaterial, unless within the statute of limitations of the State of California, which does not limit an action for relief on the ground of fraud until three years after the discovery of the fraud by the aggrieved party.

In re Pease, 129 Fed. 446.

Section 338, subdivision 4 of the C. C. P. reads:

“Within three years:

“4. An action for relief on the ground of fraud or mistake. The cause of action in such case is not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.”

Judson v. Lyford, 84 Cal. 505.

Dated, San Francisco,

February 13, 1918.

R. H. COUNTRYMAN,  
*Attorney for Appellant.*

No. 2999.

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IN THE

**United States Circuit Court of Appeals**  
**FOR THE NINTH CIRCUIT.**

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EVA MAY GILL,

*Appellant,*

VS.

FILLMORE WHITE,

*Appellee.*

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**BRIEF OF APPELLEE.**

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REUBEN G. HUNT,

*Attorney for Appellee.*

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*Filed this*.....*day of February, A. D. 1918.*

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

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No. 2999.

IN THE

# United States Circuit Court of Appeals

## FOR THE NINTH CIRCUIT.

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EVA MAY GILL,

*Appellant,*

vs.

FILLMORE WHITE,

*Appellee.*

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### BRIEF OF APPELLEE.

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#### STATEMENT OF THE CASE.

This is an appeal from a judgment of the District Court of Northern California granting to Fillmore White a discharge in bankruptcy.

The bankrupt filed his petition for discharge (Trans., p. 3); Eva May Gill, the appellant herein, filed specifications of grounds of opposition to the bankrupt's discharge (Trans., p. 5); the matter was referred to the referee in bankruptcy as Special Master to ascertain and report the facts and his conclusions thereon, and the Special Master held a hearing and presented his report to the District Judge (Trans.,



p. 10) ; Eva May Gill then filed exceptions to the report of the Special Master (Trans., p. 19) ; and the District Judge thereupon overruled these exceptions, confirmed the report of the Special Master, and granted the discharge (Trans., p. 30).

Three grounds of opposition to discharge were presented by Eva May Gill :

The first is based upon Section 14 b (2) of the Bankruptcy Act, and is that the bankrupt, with intent to conceal his financial condition, destroyed, concealed or failed to keep books of account or records from which such condition might be ascertained (Trans., p. 5). As to this ground, the Special Master, after setting forth the evidence in his report, found that the same was not proven (Trans., p. 11).

The second ground is based upon Section 14 b (4) of the Bankruptcy Act, and is that, within four months immediately preceding the filing of the petition in bankruptcy, the bankrupt transferred, removed, destroyed, concealed and permitted to be removed, destroyed and concealed certain of his property with the intent to hinder, delay and defraud his creditors (Trans., p. 6). As to this ground, the Special Master, after setting forth the evidence in his report, found that the same was not proven (Trans., pp. 12 and 13).

The third ground is based upon certain alleged fraudulent transactions (Trans., p. 6-9), but the Special Master, in his report, held that the facts alleged in this ground, even if true, were not sufficient to constitute a ground of opposition to discharge within the provisions of Section 14 of the Bankruptcy Act, and

refused to receive any testimony concerning the same (Trans., p. 16).

During the hearing before the Special Master, the wife of the bankrupt was called as a witness against him. The bankrupt, through his counsel, refused to consent to the examination of the wife against him; and an objection by counsel for the bankrupt to her testimony was sustained by the Special Master.

We take it that on this appeal the only facts that can be considered by the appellate court are those which are set forth by the Special Master in his report (Trans., p. 10-18), and by the District Judge in his opinion (Trans., p. 30). Appellant, in her "Statement of the Case," has referred to as facts the allegations contained in her third ground of opposition to discharge (Trans., p. 6-9), and the allegations set forth in her exceptions to the report of the Special Master (Trans., p. 19-30), whereas no testimony was ever introduced to prove such allegations, or any of them, and none of such allegations were ever admitted to be true.

The purpose of appellant, no doubt, in so assuming as facts these unproven and unadmitted allegations, is to make it appear that Eva May Gill was defrauded by the bankrupt. While these allegations may make out a *prima facie* case from appellant's point of view, there is, of course, another side to the story which does not appear in the appellant's "Statement of the Case." The bankrupt was defrauded out of many thousands of dollars by the husband of Eva May Gill; in fact, was relieved of every cent he had. The

shoe is really on the other foot. We contend, however, that these are matters entirely outside of the record and have no bearing on this appeal, and refer to them only so that the Court may not get a mistaken impression as to the matters before it from appellant's "Statement of the Case."

### BRIEF OF THE ARGUMENT.

**1. The finding of the Special Master, approved by the District Judge, that the first and second grounds of opposition to discharge were not proven, is amply sustained by the evidence.**

Trans., p. 10-18.

**2. Even if the evidence be regarded as conflicting, the Circuit Court of Appeals will not upset a finding of the Special Master concurred in by the District Judge except in case of a plain mistake, and no mistake appears in this case.**

*Ohio Valley Bank vs. Mack*, (C. C. A. 6th Cir.) 20 Am. B. R. 40, 163 Fed. 155;  
Trans., p. 10-18.

**3. The third ground of opposition to the discharge has no foundation in the bankruptcy act.**

Bankruptcy Act, Sec. 14 and Sec. 17, Sub. 4;  
Trans., p. 6-9, 16.

**4. The wife could not be compelled to testify against the bankrupt husband without his consent.**

Sec. 858, U. S. Revised Statutes; 34 Stat. L. 618; Fed. Stat., Ann. Supp. 1909, p. 708;  
Comp. Stat. Supp. 1909, p. 242;  
*In re Kessler*, 35 Am. B. R. 40, 225 Fed. Rep. 394;  
Subd. 1 of Sec. 1881 of Code of Civil Procedure of California.

**5. The wife's competency to testify is a moot question in this case.**

Trans., p. 30.

### ARGUMENT.

**1. The finding of the Special Master, approved by the District Judge, that the first and second grounds of opposition to discharge were not proven, is amply sustained by the evidence.**

1. It would be idle to repeat here the evidence contained in the record (Trans., p. 10-18). A perusal of the same will show conclusively that the evidence received at the hearing was all in favor of the bankrupt.

**2. Even if the evidence be regarded as conflicting, the Circuit Court of Appeals will not upset a finding of the Special Master concurred in by the District Judge except in case of a plain mistake, and no mistake appears in this case.**

2. We believe that the evidence set forth in the report of the Special Master (Trans., p. 10-18) is not conflicting: is entirely in favor of the bankrupt, but, even though such evidence be regarded as conflicting, the rule is well established that a finding of a Special Master concurred in by the District Judge will not be disturbed on appeal except in case of plain mistake. Surely no mistake appears in this record.

The leading case upon this subject is *Ohio Valley Bank vs. Mack* (C. C. A. 6th Cir.), 20 Am. Bank. Rep. 40; 163 Fed. 155, where Circuit Judge Lurton said at page 158:

"No arbitrary rule can be laid down for determining the weight which should be attached



to a finding of fact by a bankrupt referee. His position and duties are analogous, however, to those of a special master directed to take evidence and report his conclusions, and the rule applicable to a review of a referee's findings of fact must be substantially that applicable to a master's report. *Tilghman v. Proctor*, 125 U. S. 137; 8 Sup. Ct. 894; 31 L. Ed. 664; *Davis v. Schwartz*, 155 U. S. 631; 15 Sup. Ct. 237; 39 L. Ed. 289; *Emil Kiewert & Co. v. Juneau*, 78 Fed. 708; 24 C. C. A. 294; *Tu River Co. v. Brigel*, 86 Fed. 818; 30 C. C. A. 415. Much in both cases must depend upon the character of the finding. If it be a deduction from established fact, the finding would not carry any great weight, for the judge, having the same facts, may as well draw inferences or deduce a conclusion as the referee. But, if the finding is based upon conflicting evidence involving questions of credibility, and the referee has heard the witnesses, much greater weight naturally attaches to his conclusion, and the weight of authority is that the district judge, while scrutinizing with care his conclusions upon review, should not disturb his findings unless there is most cogent evidence of a mistake and miscarriage of justice. Loveland on Bankruptcy, section 32a; *In re Swift* (D. C. Mass.), 9 Am. B. R. 237; 118 Fed. 348; *In re Rider* (D. C. N. Y.), 3 Am. B. R. 178; 96 Fed. 811; *In re Waxelbaum* (D. C. Ga.), 4 Am. B. R. 120; 101 Fed. 228; *In re Stout* (D. C. Mo.), 6 Am. B. R. 505; 109 Fed. 794; *In re Miner* (D. C. Oreg.), 9 Am. B. R. 100; 117 Fed. 953. In this case the conclusions of the referee necessarily involved the credibility of the witnesses who testified to the *bona fides* of the claim preferred by Charles Mack, Sr. The conclusion he reached in favor of the validity of his debt has also passed the scrutiny of the district judge. Under such circumstances, this court is not warranted in over-



turning the conclusions of two courts upon anything less than a demonstration of plain mistake."

**3. The third ground of opposition to the discharge has no foundation in the bankruptcy act.**

3. The third ground of opposition to the discharge has no foundation in the bankruptcy act. As pointed out by the Special Master in his report (Trans., p. 16), the facts alleged in this third ground concern only the dischargeability of the claim of Eva May Gill and do not affect the bankrupt's right to a general discharge. Section 17, subdivision 4 of the Bankruptcy Act provides:

"A discharge in bankruptcy shall release a bankrupt from all his provable debts, except such as were created by his fraud \* \* \*"

The grounds of opposition to the general discharge of a bankrupt are set forth in Section 14 of the Bankruptcy Act. An examination of these grounds shows conclusively that the third ground of opposition fits none of them.

**4. The wife could not be compelled to testify against the bankrupt husband without his consent.**

4. Section 21A of the Bankruptcy Act as amended in 1903 provides as follows:

"A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt and his wife, to appear in court or before a referee or the judge of any state court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process

of administration under this Act; Provided, That the wife may be examined only touching business transacted by her or to which she is a party, and to determine the fact whether she has transacted or been a party to any business of the bankrupt."

If this section now prevailed, the order of the referee sustaining the objection to the wife's testimony might be erroneous, but, on June 29, 1906, Congress passed an act so that Section 858 of the Revised Statutes of the United States now reads:

"The competency of a witness to testify in a civil action, suit or proceeding in the Courts of the United States shall be determined by the laws of the State or territory in which the Court is held."

34 Stat. L. 618; Fed. Stat. Ann. Supp. 1909, p. 708; Comp. Stat. Supp. 1909, p. 242.

It was held in the case *In re Kessler*, 35 Am. Bank. Rep. 30; 225 Fed. Rep. 394, that a proceeding in bankruptcy is unquestionably a civil action, suit or proceeding and the competency of the wife to testify in a bankruptcy proceeding against her husband is governed by the laws of the State in which the bankruptcy proceeding is pending.

Subdivision 1, of Section 1881, of the Code of Civil Procedure of the State of California, provides as follows:

"A husband can not be examined for or against his wife without her consent; *nor a wife for or against her husband, without his consent*; nor can either, during the marriage or afterward, be, without the consent of the other, examined as to any communication made by one to the other

during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceedings for a crime committed by one against the other; or in an action brought by husband or wife against another person for the alienation of the affections of either husband or wife or in an action for damages against another person for adultery committed by either husband or wife."

Under this section a wife cannot be examined against her husband without his consent. There are certain exceptions which do not apply here. Under this act of Congress of 1906, the competency of the wife of Fillmore White to testify against him upon the opposition to discharge is to be determined by the laws of the State of California, wherein the bankruptcy proceeding is pending. We have seen that such laws do not permit her testimony against him without his consent.

**5. The wife's competency to testify is a moot question in this case.**

The District Judge in his opinion said (Trans., p. 30):

"The question of law presented as to whether the wife of the bankrupt was a competent witness who could be compelled to testify at the instance of the creditor opposing bankrupt's discharge upon the hearing of such opposition before the referee need not be decided. It is only when the transfer of property with intent to defraud his creditors has been made by the bankrupt within four months immediately preceding the filing of his petition that such transfer is made a ground

of opposition to his discharge. All the testimony shows, the referee finds, and counsel admitted at the argument of his exceptions before this Court, that the transfers to the wife of which he complains were made long before the beginning of the four months period. In such case the wife's testimony even if competent could not affect the result."

It seems to us that under these circumstances, the competency of the wife of Fillmore White to testify upon the opposition to discharge is purely a moot question. Her testimony would bring out nothing other than what is already disclosed by the record. As said by the District Judge, therefore, the question of law presented need not be decided.

### CONCLUSION.

Many points are made by appellant in her "Brief of the Argument" that have no bearing whatever upon this appeal. This is purely an opposition to discharge. Questions relating to the general examination of the bankrupt at meetings of creditors, rights of action in the trustee to set aside on the ground of fraud transfers of property more than four months before the filing of the petition in bankruptcy, etc., we take it, are not involved here.

We contend that there are but four questions involved on this appeal:

(1) Is the finding of the lower court that the first ground of opposition was not proven, sustained by the evidence?

(2) Is the finding of the lower court that the second ground of opposition was not proven, sustained by the evidence?

(3) Do the facts alleged in the third ground constitute a ground of opposition to discharge under Section 14 of the Bankruptcy Act?

(4) Is the wife competent to testify against her bankrupt husband upon an opposition to his discharge without his consent.

As to the fourth question, we further contend that it is purely a moot question in this case.

Respectfully submitted,

REUBEN G. HUNT,

Attorney for Appellee. *B.D.*













